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In the
Supreme Court of the United States

PETRIT NDRECA, a.k.a. Xhafer Gorja
ENGLANTINA NDREU, a.k.a. Elmoza Gorja

Petitioners,

v.

U.S. ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether an Alien seeking a Petition for Review in removal proceedings has a Fifth Amendment Due Process right to effective assistance of counsel and the deadline for filing the Petition for Review should be equitably tolled when retained Counsel provides ineffective assistance of counsel in untimely filing a Petition for Review by one day.

2. Whether an Alien seeking a Petition for Review in removal proceedings can conclusively establish ineffective assistance of counsel, by counsel's own acknowledgment of ineffective assistance that is untimely in filing a Petition for Review by one day, and therefore the Alien should not be procedurally barred from moving forward with their Petition for Review.

PARTIES TO THE PROCEEDING

The Petitioners, who were petitioners before the Eleventh Circuit Court of Appeals in their Petition for Review and respondents before the Board of Immigrations Appeals are husband and wife, Petrit Ndreca, a.k.a. Xhafer Gorja, and Englantina Ndreu, a.k.a. Elmoza Gorja.

The Respondent is the United States Attorney General, an executive representative of the United States government, the Respondent before the Eleventh Circuit Court of Appeals, and the executive representative of the Department of Homeland Security who represented the government before the Board of Immigration Appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners are not a corporate entity and no parent corporation exists, and no publicly owned company holds any ownership interest in the Petitioners.

PRO SE PETITIONER'S INTENT TO RETAIN COUNSEL

The Pro Se Petitioner, Englantina Ndreu, expresses to the Court her intent to retain Counsel for these proceedings and informs the Court that she is currently in process of retaining such Counsel.

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OPINION BELOW

The ruling of the United States Court of Appeals for the Eleventh Circuit dated September 14, 2006, dismissing the Petitioners' Petition for Review for lack of jurisdiction is reproduced at Appendix A at 1 a.

The ruling of the United States Court of Appeals for the Eleventh Circuit dated November 7, 2006, denying the Petitioners' Motion for Reconsideration (and Rehearing) is reproduced at Appendix C at 17a.

The Decision and Order of the Board of Immigration Appeals dated July 12, 2006, dismissing the Petitioners' appeal of the Immigration Judge is reproduced at Appendix D at 18a.

JURISDICTION

The Order of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on November 7, 2006. This petition is timely under Supreme Court Rule 13.1 and Supreme Court Rule 13.3 because it is being filed within 90 days of

the entry of the order sought to be reviewed. This Court has jurisdiction to review the order of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States of America provides that "No person shall... be deprived of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

The Petitioners sought asylum and withholding of removal under section 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), and protection under the Convention against Torture. On August 25, 2005, the Immigration Judge presiding denied their claims for relief. On September 8, 2005, Petitioners timely filed an appeal of the Immigration Judge's decision before the Board of Immigration Appeals. On April 4, 2006, Petitioners filed a brief in support of their appeal.

On July 12, 2006, the Board of Immigration Appeals dismissed the Petitioners' appeal. The Board of Immigration Appeals' Order dismissing the Petitioners'/Respondents' appeal (Petitioners were the Respondents before the Board of Immigration Appeals) is reproduced here as Appendix D. The Petitioners then filed a Petition for Review before the Eleventh Circuit Court of Appeals.

Through out the proceedings, Petitioners had the assistance of the same Counsel, Noel H. Flasterstein. Mr. Flasterstein represented the Petitioners before the Immigration Court and subsequently before the Board of Immigration Appeals. After the Petitioners' appeal was dismissed and after discussing the matter with their Counsel, the Petitioners elected to file a Petition for Review with the assistance of Mr. Flasterstein.

Mr. Flasterstein prepared and filed the Petition for Review. Although admitted before the Eleventh Circuit, and an Immigration practitioner for the past few years, Mr. Flasterstein had never previously filed a Petition for Review before any Court. Mr.

Flasterstein referred to the Federal Rules of Appellate Procedure (hereafter "FRAP") and the Eleventh Circuit Rules in an effort to determine the deadline for filing a Petition for Review. Mr. Flasterstein referred to FRAP 15 *Review or Enforcement of an Agency Order - How Obtained; Intervention*, in particular, where he noted that, "Review of an agency order is commenced by filing, within the time prescribed by law," Counsel then *incorrectly* referenced this rule with FRAP 4 *Appeal as of Right - When Taken*, and noted specifically that, "the notice of appeal ... must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

Mr. Flasterstein then contacted the Eleventh Circuit Court of Appeals Clerk's Office by telephone to confirm his determination that a Petition for Review had to be filed within 30 days. The assistant Clerk, understandably, could not specifically answer Counsel's query and referred Counsel back to the Federal Rules of Appellate Procedure for guidance.

After again reviewing the Federal Rules of Appellate Procedure, Counsel inadvertently correctly determined that the deadline for filing a Petition for Review of the Board of Immigration Appeals was in fact 30 days. On or around early August of 2006, Mr. Flasterstein c)nce again contacted the Eleventh Circuit's Clerk's Office by telephone and questioned whether the Eleventh Circuit applied the "mailbox rule". Counsel, admittedly, did not questioned specifically whether the **"mailbox rule"** was applicable to filing a Petition for Review or for that matter a Notice of Appeal. The assistant clerk responded that time of receipt was taken **from the date of the certificate** of service. Counsel, therefore incorrectly assumed that the date of filing would be determined from the "mailbox rule", in other words, the date of mailing the Petition for Review.

On August 11, 2006, the 30th day from the dismissal of **Petitioners'** appeal before the Board of Immigration Appeals (hereafter BIA), Mr. Flasterstein mailed the Petitioners' Petition for Review via Federal Express courier service. (See Appendix B,

Exhibit "A"). Shortly thereafter, On September 14, 2006, the Eleventh Circuit dismissed the Petitioners' Petition for Review, sua *sponte,* for lack of jurisdiction noting that the Petition for Review was filed on August 14, 2006[1]. Because Mr. Flasterstein was "ineffective" in failing to timely file the Petition for Review, Petitioners have been denied *Due* Process and ***effective assistance of counsel.***

Mr. Flasterstein was primarily ineffective in failing to realize that a Petition for Review is considered filed when it is received by the Clerk. Mr. Flasterstein incorrectly assumed the "mailbox rule" applicable and was not aware at the time that the Petition for Review needed to be filed at the Clerk's Office on August 11, 2006, and not merely post marked on said date.

Mr. Flasterstein came to realize, and communicated same to Petitioners, subsequent to his previous error, that "An alien seeking review of a BIA decision must file a petition for review within 30 days of the BIA's final order of removal. *See* INA § 242(b)(1), 8

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[1] On August 11, 2006, Counsel sent the Petition via Federal Express overnight service. August 11, 2006 was a Friday, so the Clerk did not receive the Petition until Monday, August 14, 2006.

U.S.C. § 1252(b)(1). A petition for review is considered to be filed when it is received by the clerk of the Court. Fed.R.App.P. 25(a)(2)(A). *Plata, et al. v. U.S. Attorney General,* 2006 WL 2034703 (C.A.11); *Arango v. U.S. Attorney General,* 2006 WL 2311119 (C.A. 11). Mr. Flasterstein learned, as a result of his error and at great expense to the Petitioners, that the "mailbox rule" is inapplicable in filing a Petition for Review and that a Petition for Review must be physically located or filed in the Clerk's Office on the 30th day from the final Order of Removal. Counsel's ultimate error was to incorrectly assume that having the Petition for Review postmarked (or rather, the Federal Express equivalent) on August 11, 2006, would render said Petition timely filed.

Upon review of this Court's Order dismissing the Petition for Review, Mr. Flasterstein realized that his error and inaccurate interpretation of the Rules of Appellate Procedure and Federal statutes in determining the exact deadline and requirements for properly filing a Petition for Review severely and substantially

prejudiced the Petitioners, ultimately resulting in the dismissal of their Petition for Review through no fault of their own.

On October 5, 2006, Mr. Flasterstein filed a Motion for Reconsideration (and Rehearing) of the Eleventh Circuit's Order dated September 14, 2006, dismissing the Petitioners' Petition for Review for lack of jurisdiction.[2] In the Petitioners' Motion for Reconsideration (and Rehearing) reproduced here at Appendix B at a2, Petitioners' Counsel argued specifically, and admitted that it was his own ineffective assistance of counsel that caused undue and substantial detriment to the Petitioners and stated specifically "Counsel unequivocally admits to his own ineffective assistance of counsel resulting in undue, substantial prejudice to the Petitioners." See Appendix B at 7a. It was because of Counsel's error alone, that the Petitioners were deprived of their right to present their case before the Eleventh Circuit Court of Appeals. As such, Counsel

[2] Petitioners' Motion for Reconsideration and Rehearing was formally titled *Motion for Reconsideration on Dismissal of Petition for Review for Lack of Jurisdiction of a Final Order of the Board of Immigration Appeals.* Although not appropriately titled as a Motion for Reconsideration and Rehearing, the intent and operative construction of the motion was one for a Rehearing and a Reconsideration of the Eleventh Circuit's ruling dismissing the Petitioners' Petition for Review.

argued that the Petitioners were denied their Due Process right to effective assistance of counsel , and had Counsel timely filed their Petition for Review, they would have at minimum been able to present their case that could have indeed resulted in a different outcome of the proceedings below.

In the Motion for Reconsideration (and Rehearing), Counsel pointed out that the Eleventh Circuit has previously recognized that, "It is well established in this Circuit that an alien in civil deportation proceedings, while not entitled to a Sixth Amendment right to counsel, has the ***constitutional right*** under the Fifth Amendment ***Due Process Clause*** right to a fundamentally fair hearing to ***effective*** assistance of counsel where counsel has been obtained." *Dukane v. U.S Attorney General,* 399 F.3d 1269, 1273 (11th Cir. 2005) (citations omitted) (emphasis in the original)(emphasis added). Counsel further directed the Eleventh Circuit to the fact that it had previously ruled that, ". . an alien must establish that his or her

counsel's performance was deficient to the point that it impinged upon the fundamental fairness of the hearing such that the alien was ***unable to reasonably present his or her case.*** *" Dukane,* 399 F.3d at 1274. (citations omitted)(emphasis added).

Counsel fiuther argued that in *Dukane,* in addition to "substantially" following the procedural requirements of *In Matter of Lozada,* 19 I & N Dec. 637 (BIA 1988) in making a claim for ineffective assistance of counsel, this Court also requires that ". . . a petitioner claiming ineffective assistance of counsel . . .must also show prejudice." , and that, "prejudice exists when the performance of counsel is so inadequate that there is a reasonable probability that but for the attorney's error, the outcome of the proceedings would have been different." Id. (citations omitted).

In *Dukane,* the Eleventh Circuit held, "Where counsel fails to file any appeals brief in the context of an immigration proceeding, effectively depriving an alien of an appellate proceeding entirely,.

there is a rebuttable presumption of prejudice." Id. at 1275.(citations omitted).

Counsel, then brought to the Court's attention , however, that the Eleventh Circuit in *Dukane* concluded that the BIA did not err in failing to find a presumption of prejudice, and therefore a valid ineffective assistance of counsel claim, by failure of counsel to file an appellate brief, given that Immigration Judge below made an adverse credibility finding. Id. The Eleventh Circuit had opined, because of the adverse credibility finding by the Immigration Judge, Dukane had ". . . failed to show that an appeals brief could have changed the outcome of the appeal proceeding before the BIA with regard to that issue. . ." and therefore affirmed the BIA's denial of Dukane's motion to reopen based on his claim of ineffective assistance of counsel because of counsel's failure to file a brief. *Id.*

Counsel addressed the procedural requirements of *Lozada* has being inapplicable, given that Counsel admitted to his error and the resulting ineffective assistance of counsel, and because the claim for

ineffective assistance of counsel is limited to the failure of Counsel to timely file the Petition of Review, and is not being asserted as to occur in either of the proceedings below, either before the Immigration Judge, or before the Board of Immigration Appeals.

Although an adverse credibility finding was made by the Immigration Judge and affirmed by the BIA, in the Petitioners' case, as in *Dukane,* Counsel argued that Eleventh Circuit should still find that the Petitioners were substantially prejudice by the ineffective assistance of counsel in failing to timely file their Petition for Review.

Counsel pointed out to the Eleventh Circuit that, on appeal before the BIA, Petitioners challenged the Immigration Judge adverse credibility finding. The BIA affirmed the finding of adverse credibility, referencing documents submitted by the Petitioners as being fraudulent as determined by the Department of Homeland Security's Forensic Document Laboratory (hereafter FDL). The BIA recognized that the Petitioners had submitted documents to be

authenticated by the U.S. Embassy in Tirane, Albania but noted "not all of the documents were authenticated" then incorrectly concluded that the Petitioners failed to "adequately address these issues on appeal." Petitioners' purpose for filing their Petition for Review was to directly challenge ***both*** adverse credibility findings as not being supported by "substantial evidence." Petitioners specifically addressed these issues on appeal before the BIA, pointing out that the Immigration Judge found documents to be fraudulent based on the findings of the FDL (A political sub-entity of the U.S. government) that tenuously concluded that the documents "were not what they purported to be", notwithstanding, that the US Embassy (another political sub-entity of the U.S. government) in Tirane, Albania contradicted these FDL findings by authenticating, thereby finding the documents not to ***be*** fraudulent, some of these same documents in controversy held to be "fraudulent" by the courts below based on the findings of the FDL.

In making and upholding the adverse credibility findings, the courts below were relying on the same source (the U.S. government) that was providing contradictory conclusions about the same documents and opted to rely on the conclusions that were detrimental to the Petitioners' cause. It was an abuse of discretion for the courts below to base a finding of adverse credibility when one sub-entity of the U.S. government concludes that the documents submitted were "fraudulent" and another sub-entity of the US government authenticates said documents and concludes that they are not fraudulent. It is even more egregious that the courts chose to rely on the findings of the FDL when it is taken into consideration that the FDL is based and operates here in the United States in conducting its examinations of the documents, whereas the US Embassy obviously is located in Albania, the documents' country of origin. It should be reasonably concluded that the US Embassy in Albania would have greater familiarity with both authentic and fraudulent documents of Albanian ori2in.

Petitioners took issue with the Immigration Judge's adverse credibility finding and the BIA's subsequent affirmance and wanted to address these issues before the Eleventh Circuit arguing an abuse of discretion by both courts. The Petitioners' asserted then and now, that a denial of their claim for ineffective assistance of counsel, as not being substantially prejudicial, effectively deny the Petitioners' their Due Process right to effective assistance of counsel and their right to challenge the evidence, and other methods relied upon by the courts below in making their adverse credibility determinations. The Petitioners asserted that *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000) should have been controlling and determinative in their Motion for Reconsideration (and Rehearing) in allowing them to proceed with their Petition for Review. Because the Petitioners cited to and were relying on the authority of *Dearinger ex rel. Volkova*, when the Eleventh Circuit rejected the Petitioners' constitutional claim of a Due Process violation in their Motion for

Reconsideration (and Rehearing), it in effect, came into direct conflict with the Ninth Circuit.

In *Dearinger ex rel. Tlolkova*, the Ninth Circuit stated in relevant part:

> To show a due process violation, an alien must prove "not merely ineffective assistance of counsel, but assistance ***which is so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the Fifth Amendment due process clause."*** *See* Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir.1986); *see also* Lata v. INS, 204 F.3d 1241, 1246 (9th Cir.2000) (alien must show error and substantial prejudice). In Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 1038, 145 L.Ed.2d 985 (2000), the Supreme Court held that where a defendant can show that there is a reasonable probability that he would have appealed but for counsel's deficient failure to consult with him about an appeal, prejudice is presumed. Although *Flores-Ortega* concerns a defendant's Sixth Amendment right to counsel, it sheds light on our inquiry under the Fifth Amendment right to due process.
>
> Like the habeas petitioner in *Flores-Ortega*, ***where an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely.*** And, as the Court stated in *Flores-Ortega*, this error "mandates a presumption of prejudice because 'the adversary process itself has been rendered 'presumptively unreliable.' " Id. at 1038 (quoting United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657

1984 (addressing denial of counsel during a critical stage of a judicial proceedings)). *The Flores-Ortega Court continued that it could not "accord any presumption of reliability to judicial proceedings that never took place." Id.* We agree and conclude that the holding of *FloNes-Ortega* applies with equal force to claims of ineffective assistance of counsel arising out of the Fifth Amendment right to due process. Applying the *Flores-Ortega* test to this case, we note that the Friends have shown that *Volkova would have timely appealed but for her counsel's error: they showed that the appeal was actually filed, and that due to counsel's error, it was filed one day late. We conclude that prejudice should be presumed and, therefore, that Volkova's counsel provided ineffective assistance.*

Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1045 (9th Cir. 2000) (emphasis added).

Like the present case, the Petitioners argued that their counsel filed the Petition for Review one day late.[3] Likewise, Petitioners would have timely filed their Petition for Review, but for "counsel's error." As such, the Eleventh Circuit, in accord with the Ninth Circui , should have found that Petitioners' Counsel "provided ineffective assistance," denying Petitioners a constitutional guarantee

[3] Petitioners' Counsel provided the Petition for Review to Federal Express courier service for overnight express delivery to the Eleventh Circuit's Clerk's Office on August 11, 2006, the filing deadline. August 12, 2006 was a Saturday, the day the Clerk would have received the Petition had it not been a Saturday. The next business day was Monday August 14, 2006, the day the Petition was actually filed and received by the Clerk. The Petition for Review, therefore, was in actuality only one day late

accorded to aliens under the Fifth Amendment right to Due Process. Because the Petitioners, in seeking a Petition for Review are directly challenging the adverse credibility findings by both the Immigration Judge and the BIA's subsequent affirming of those findings, asserting that both courts abused their discretion in failing to properly rely on "substantial evidence" or to considered contradicting evidence, it can not be easily determined that even if Counsel had timely filed their Petition for Review that the outcome in these proceedings would be the same before the Eleventh Circuit. Petitioners' respectfully requested that the Eleventh Circuit give them their chance to challenge the adverse credibility findings below, which they would have been given, but for Counsel's ineffective assistance of counsel in failing to timely file their Petition for Review.

On November 7, 2006, the Eleventh Circuit Court of Appeals denied Petitioners' Motion for Reconsideration (and Rehearing) of its September 14, 2006, Order dismissing the Petitioners' Petition for Review for a lack of jurisdiction.

REASONS FOR GRANTING THE PETITION

This case presents important issues of Federal law of constitutional significance with respect to application of the Fifth Amendment's right to Due Process afforded aliens in deportation proceedings in which the Eleventh Circuit and the Ninth Circuit are in direct conflict. All Circuits appear to be in agreement with the premises that "'In deportation proceedings, an alien's right to be represented by counsel is based on the due process guarantees of the Fifth Amendment." *Iturribarria v.* INS, 321 F.3d 889, 899 (9th Cir.2003). It is also widely held that an alien "has the *constitutional* right under the Fifth Amendment *Due Process Clause* right to a fundamentally fair hearing to *effective* assistance of counsel where counsel has been obtained." *Dukane v. U.S. Attorney General,* 399 F.3d 1269, 1273 (11th Cir. 2005) (emphasis added). And it is further recognized that, "Although aliens have no Sixth Amendment right to counsel at deportation hearings, *Goonsuwan v. Ashcroft,* 252 F.3d

383, 385 n. 2 (5th Cir.2001), due process requires that such hearings be fundamentally fair. *Animashaun v.* INS, 990 F.2d 234, 238 (5th Cir.1993). "[T]o succeed on a collateral attack of a deportation order on due process grounds, an alien must first demonstrate that he has suffered actual prejudice." *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 302 (5th Cir.2002).

Where the Circuits appear to diverge, and where the Eleventh and Ninth Circuits specifically do, is what constitutes "actual prejudice" sufficient to sustain a claim of ineffective assistance of counsel.

The Ninth Circuit has held where counsel fails to timely file a Petition for Review by one day to be sufficient to support a finding of ineffective assistance of counsel. In addition, it found the BIA abused its discretion when failed to consider, or address, a claim for ineffective assistance of counsel. The Ninth Circuit held:

> The BIA also abused its discretion when it failed to consider Uribe's ineffective assistance of counsel claim regarding Mr. Chowdhury, who did not timely file a petition for review in our

> court. *An attorney provides ineffective assistance of counsel when he or she files a petition for review in our court one day late.* Dearinzer ex rel. Volkova v. Feno, 232 F.3d 1042, 1044-45 (9th Cir.2000). Here, *the BIA did not consider Uribe's ineffective assistance of counsel claim* regarding Mr. Chowdhury, let alone "weigh[ ] the evidence of counsel's performance," as *Maravilla* requires. Therefore, *we hold that the BIA abused its discretion when it did not consider Uribe's ineffective assistance of counsel claim* regarding Mr. Chowdhury.

Uribe v. Gonzales, 163 Fed. Appx. 462, 465 (9th Cir. 2005)[4] (emphasis added).

Likewise, in the present case, the fact that the Petitioners raised a claim of ineffective assistance of counsel, it is arguably, an abuse of discretion for the Eleventh Circuit to summarily deny their Motion for Reconsideration (and Rehearing) without addressing or taking into consideration the Petitioners claim of a Due Process violation based on a claim of ineffective assistance of counsel, especially given that Mr. Flasterstein, Counsel below, specifically acknowledged his error as ineffective assistance of counsel. When the Eleventh Circuit

[4] Although, *Uribe v. Gonzales is* an unpublished opinion, the premise that filing a Petition for Review by one day late constitutes ineffective assistance of counsel is a precedent of authority due to that court's nitatinn tn *nonrinavr or rvl Vnlknvn v Rvnn* whirh ie a nnhlichaA nninin aAnntarl hv tha Ninth C'irrnit

denied the Petitioners Motion for Reconsideration (and Rehearing), it should have focused on Counsel's conduct in failing to timely file the Petition for Review and not the fact that a Petition filed on Petitioners' behalf was one day late.

In Maravilla Maravilla v. Ashcroft, 381 F.3d 855 (9th Cir. 2004), the Ninth Circuit held in relevant part:

> Ineffective assistance of counsel in a removal proceeding amounts to a violation of due process under the Fifth Amendment if "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir.1985). Such a claim requires two showings. Petitioners first must demonstrate "that counsel [failed to] perform with sufficient competence." *Lin v.* Ashcroft, 377 F.3d 1014, 1027 (9th Cir.2004). Second, they must show that they were prejudiced by their counsel's performance. *See* Iturribarria v. *INS*, 321 F.3d 889, 899-900 (9th Cir.2003).
>
> . . .
>
> ***The BIA should have begun its analysis by asking if competent counsel would have acted otherwise. The opinion never weighs the evidence of counsel's performance so as to reach a finding on his competence, the first required showing.*** Of course, it is conceivable that the BIA viewed the prejudice question as dispositive, and thus reasoned that it need not resolve the

question of counsel's competence. We can only speculate, for the opinion is silent on this issue. This *court has held that the BIA must "indicate with specificity that it heard and considered petitioner's claims."* Arrozal v. INS, 159 F.3d 429, 433 (9th Cir.1998). Because it neither reached this first aspect of petitioners' claim, nor explained the omission, the BIA abused its discretion. The second question in an ineffective assistance of counsel claim is *whether the client was prejudiced.* While the BIA did reach this question, it did so under the wrong standard. Petitioners must demonstrate that counsel's performance was so inadequate that it "may have affected the outcome of the proceedings." *Iturribarria*, 321 F.3d at 900 (quotation marks and citation omitted). *They need not show that they "would win or lose on any claims. "*Lin, 377 F.3d 1014, 1027.

Maravilla, 381 F.3d at 857-859 (emphasis added).

Likewise, Petitioners assert that the standards held applicable to the BIA by the Ninth Circuit in addressing claims for ineffective assistance of counsel, should be applied to Eleventh Circuit in reviewing a claim for ineffective assistance of counsel for failing to timely file a Petition for Review. At a very minimum, it is clear that the Ninth Circuit, in conflict with the Eleventh Circuit, would have

equitably tolled the Petitioners' deadline for filing their Petition for Review when they raised their claim for ineffective assistance of counsel in their Motion for Reconsideration (and Rehearing) for failing to timely file their Petition. The Ninth Circuit has specifically held:

> This court, however, recognizes equitable tolling of deadlines and numerical limits on motions to reopen or reconsider during periods when a petitioner is prevented from filing because of deception, fraud, *or error,* as long as the petitioner acts *with due diligence in discovering the deception, fraud, or error. See, e.g.,* Rodriguez-Lariz v. INS, 282 F.3d 1218(9th Cir.2002); Socop-Gonzalez, 272 F.3d 1176; *Lopez,* 184 F.3d 1097. Equitable tolling does not, as the INS posits, apply only in ineffective assistance of counsel cases involving individuals posing as attorneys. Where the ineffective performance was that of an actual attorney ... activity causing an essential action in her client's case to be undertaken ineffectively, out of *time,* or not at all, equitable tolling is available. *See generally* RodriguezLariz, 282 F.3d at 1223-26.

Iturribarria v. INS, 321 F.3d 889, 897-898 (9th Cir.2003) (emphasis added).

In the present case, the Petitioners acted with extreme *due diligence* in bringing to the court's attention in their Motion for Reconsideration (and Rehearinia) that thev were substantiallv

prejudiced by Mr. Flasterstein's acknowledged ineffective assistance of counsel. The Eleventh Circuit's denial of their Motion of Reconsideration (and Rehearing), based on their claim of ineffective assistance of counsel violates the Petitioners' Due Process right to effective assistance of Counsel and is in conflict with the Ninth Circuit.

CONCLUSION

Because the conflict existing between the Eleventh Circuit and the Ninth Circuit with respect to the contours of an alien's Fifth Amendment right to Due Process in removal proceedings, it is respectfully requested that this Honorable Court grant the Petition for a Writ of Certiorari so that these issues can be fully addressed.

Respectfully submitted,

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APPENDIX

APPENDIX A - Order Dismissing Petition for Review

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-14376A

PETRIT NDRECA,
a.k.a. Xhafer Gorja,
ENGLANTINA NDREU,
a.k.a. Elmoza Gorja

Petitioners

versus

Respondent.

U.S. ATTORNEY GENERAL,

On Petition for Review of a Final Order
of the Board of Immigration Appeals

[Filed Sept. 14, 2006]

Before BIRCH, BLACK, and
BARKETT, Circuit Judges.

BY THE COURT:

This petition for review is DISMISSED, sua sponte, for lack of jurisdiction. The petition for review, filed on August 14, 2006, is untimely from the Board of Immigration Appeals's July 12, 2006, final order. See 8 U.S.C. § 1252(b)(1); Fed.R.App.P. 15(a)(1); Stone v. INS, 514 U.S. 386, 405, 115 S.Ct. 1537, 1549, 131 L.Ed.2d 465 (1995).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir.R. 40-4 and all other applicable rules.

APPENDIX B - Motion for Reconsideration (and Rehearing)

N THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-14376-A

PETRIT NDRECA, a.k.a.
Xhafer Gorja ENGLANTINA
NDREU, a.k.a. Elmoza Gorja

Petitioners,

versus

U.S. ATTORNEY GENERAL

Respondent.

Motion for Reconsideration on Dismissal of Petition for Review for Lack of Jurisdiction of a Final Order of the Board of Immigration Appeals

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US COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Petrit Ndreca & Englantina Ndreu

v.

U.S. Attorney General Case No. 06-14376A

The following list of interested persons is certified, pursuant to Eleventh Circuit Court of Appeals Rule 26.1-1 & 27-(a) (9).

BOARD OF IMMIGRATION APPEALS DAVID

V. BERNAL, Co-Counsel for Respondent NEIL

P. MULLER, BIA Panel Member

PETRIT NDRECA, Petitioner ENGLANTINA

NDREU, Petitioner ANTHONY P. NICASTRO,

Counsel for Respondent GAIL PADGETT,

Immigration Judge
RICK MOORE, Chief Counsel for the Department of Homeland Security

Comes Now, the Petitioners I'ETRIT NDRECA and ENGLAN'TINA NDREU, by and through their undersigned Counsel, and file this Motion for Reconsideration of the Dismissal of their Petition for Review of a Final Order of the Board of Immigration Appeals for a Lack of Jurisdiction and states as follows in support thereof:

1. On July 12, 2006, the Board of Immigration Appeals (BIA) issued it decision dismissing Petitioners' appeal. In order to timely file a Petition for Review this Court's Clerk Office needed to receive the Petition by August 11, 2006.

2. Attorney Noel Flasterstein, the undersigned counsel, had been previously retained by Petitioners to represent them in their claim for Asylum and Withholding of Removal, and for their appeal before the Board of Immigration Appeals.

3. Upon receipt of the Board's dismissal of their appeal, counsel contacted Petitioners and discussed options with proceeding. Counsel and Petitioners agreed that a Petition for Review before this Court was the best method for proceeding with their claim.

4. Counsel, although admitted before the Eleventh Circuit and an Immigration practitioner for the past few years, had never previously filed a Petition for Review before any Court.

5. Counsel referred to the Federal Rules of Appellate Procedure (hereafter FRAP) and the Eleventh Circuit Rules in an effort to determine the deadline for filing a Petition for Review.

6. Counsel referred to FRAP 15 Review or Enforcement of an Agency Order - How Obtained; Intervention, in particular, where he noted that, "Review of an agency order is commenced by filing, within the time prescribed by law," Counsel then *incorrectly* referenced this rule with FRAP 4 Appeal as of Right - When Taken, and noted specifically that, "the notice of appeal ... must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

7. Counsel then contacted the Eleventh Circuit Court of Appeals Clerk's Office by telephone to confirm his determination that a Petition for Review had to be filed within 30 days. The assistant Clerk, understandably, could not specifically answer Counsel's query and referred Counsel back to the Federal Rules of Appellate Procedure for guidance.

8. After again reviewing the Federal Rules of Appellate Procedure, Counsel inadvertently correctly determined that the deadline for filing a Petition for Review of the Board of Immigration Appeals was 30 days.

9. On or around early August of 2006, Counsel once again contacted the Clerk's Office by telephone and questioned whether the Eleventh Circuit

applied the "mailbox rule". Counsel, admittedly, did not questioned specifically whether the "mailbox rule" was applicable to filing a Petition for Review or for that matter a Notice of Appeal. The assistant clerk responded that time of receipt was taken from the date of the certificate of service. Counsel, therefore incorrectly assumed that the date of filing would be determined from the "mailbox rule", in other words, the date of mailing the Petition for Review.

10. On August 11, 2006, the 30th day from the dismissal of Petitioners' appeal before the Board of Immigration Appeals, Counsel mailed the Petitioners' Petition for Review via Federal Express courier service. (See Exhibit "A").

11. On September 14, 2006, this Court dismissed Petitioners' Petition, sua sponte, for lack of jurisdiction noting that the Petition for Review was filed on August 14, 2006 (On August 11, 2006 Counsel sent the Petition via Federal Express overnight service, August 11, 2006 was a Friday, so the Clerk did not receive the Petition until Monday, August 14, 2006.) and that the Board of Immigration Appeals' final order was issued on July 12, 2006 citing to federal statutes and case law. (The Authority cited to by this Court provided guidance to Counsel in realizing his error in untimely filing the Petition for Review.).

12. Upon review of this Court's Order dismissing the Petition for Review and subsequent research, Counsel realized that his error and inaccurate interpretation of the Rules of Appellate Procedure and Federal statutes in determining the exact deadline and requirements for properly filing a Petition for Review severely and substantially prejudiced the Petitioners, ultimately resulting in the dismissal of their Petition for Review through no fault of their own.

13. Counsel unequivocally admits to his own ineffective assistance of counsel resulting in undue, substantial prejudice to the Petitioners.

14. Counsel now recognizes, subsequent to his previous error, that "An alien seeking review of a BIA decision must file a petition for review within 30 days of the BIA's final order of removal. *See INA* § 242(b)(1), 8 U.S.C. § 1252(b)(1). A petition for review is considered to be filed when it is received by the clerk of the Court. Fed.R.App.P. 25(a)(2)(A). *Plata, et al. v. U.S. Attorney General*, 2006 WL 2034703 (C.A.11); *Arango v. U.S. Attorney General*, 2006 WL 2311119 (C.A. 11). Counsel now knows that the "mailbox rule" is inapplicable in filing a Petition for Review and that a Petition for Review must be physically located or filed in the Clerk's Office on the 30th day from the final Order of Removal. Counsel's ultimate error was to incorrectly assume that having the Petition for Review postmarked

(or rather, the Federal Express equivalent) on August 11, 2006 would render said Petition timely filed.

15. Counsel has to accept full responsibility for his "ineffective assistance of counsel" in rendering the Petitioners' Petition for Review as untimely filed. Counsel's error can be characterized, at best as a misinterpretation of the Federal Rules of Appellate Procedure and Federal Statutes pertaining to a review of a final order of removal or at worst, just plain incompetence with respect to this matter.

16. This Court has previously recognized that, "It is well established in this Circuit that an alien in civil deportation proceedings, while not entitled to a Sixth Amendment right to counsel, has the *constitutional right* under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to *effective* assistance of counsel where counsel has been obtained." *Dukane v. U.S. Attorney General*, 349 F.3d 1269, 1273 (11th Cir. 2005) (citations omitted) (emphasis in the original)(emphasis added).This Court further noted that, ". . an alien must establish that his or her counsel's performance was deficient to the point that it impinged upon the fundamental fairness of the hearing such that the alien was *unable to reasonably present his or her case.*" *Dukane*, 349 F.3d at 1274. (citations omitted)(emphasis added).

17. *In Dukane*, in addition to "substantially" following the procedural requirements of *In Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988) in making a claim for ineffective assistance of counsel, this Court also *requires that* ". . . a petitioner claiming ineffective assistance of counsel ... must also show prejudice." , and that, "prejudice exists *when the* performance of counsel is so inadequate that there is a reasonable probability that but for the attorney's error, the outcome of the proceedings would have been different." Id. (citations omitted).

This Court further noted, "Where counsel fails to file any appeals brief in the context of an immigration proceeding, effectively depriving an alien of an appellate proceeding entirely, there is a rebuttable presumption of prejudice." Id. at 1275.(citations omitted).

In Dukane, however, this Court concluded that the BIA did not err in failing to find a presumption of prejudice, and therefore a valid ineffective assistance of counsel claim, by failure of counsel to file an appellate brief, given that Immigration Judge below made an adverse credibility finding. Id. This Court opined, because of the adverse credibility finding by the Immigration Judge, Dukane had ". . . failed to show that an appeals brief could have changed the outcome of the appeal proceeding before the BIA with regard to that issue. . ." and therefore affirmed the BIA's denial of

Dakane's motion to reopen based on his claim of ineffective assistance of counsel because of counsel's failure to file a brief. Id.

In the instant case, the procedural requirements of *Lozada* should not be held applicable, given that Counsel admits to his error and the resulting ineffective assistance of counsel, and because the claim for ineffective assistance of counsel is limited to the failure of counsel to timely file the Petition of Review, and is not being asserted as to occur in either of the proceedings below; either before the Immigration Judge, or before the Board of Immigration Appeals.

Although an adverse credibility finding was made by the Immigration Judge and affirmed by the BIA, in the instant case, as in *Dukane*, this Court should not find that the Petitioners were not substantially prejudice by the ineffective assistance of counsel. Again, the ineffective assistance of counsel occurred before this Court in Counsel's failure to timely file Petitioners' Petition for Review and did not occur in either of the proceedings below.

Furthermore, on appeal before the BIA, Petitioners challenged the Immigration Judge adverse credibility finding. The BIA affirmed the finding of adverse credibility, referencing documents submitted by the Petitioners as being fraudulent as determined by the Department of Homeland Security's Forensic Document Laboratory (FDL). The BIA recognized that the

Petitioners had submitted documents to be authenticated by the U.S. Embassy in Tirane, Albania but noted "not all of the documents were authenticated" then incorrectly concluded that the Petitioners failed to "adequately address these issues on appeal." Petitioners' purpose for filing their Petition for Review is to directly challenge ***both*** adverse credibility findings as not being supported by "substantial evidence." Petitioners specifically addressed these issues on appeal before the BIA, pointing out that the Immigration Judge found documents to be fraudulent based on the *findings of the FDL that could* only suggest that the documents "were not what they purported to be", notwithstanding, that the US Embassy in Tirane, Albania contradicted these FDL findings by authenticating some of these same documents in controversy held to be "fraudulent" by the courts below. Petitioners take serious issue *with the* Immigration Judge's adverse credibility finding and the BIA's subsequent affirmance. To deny Petitioners' claim for ineffective assistance of counsel, as not being substantially prejudicial, *will deny* Petitioners' their Due Process right to *effective assistance* of counsel and their right to challenge the evidence and other methods utilized by the courts below in making their adverse credibility determinations.

BEST AVAILABLE COPY

18 The Petitioners assert that *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000) should be persuasively controlling and determinative in the instant case. In *Dearinger ex rel. Volkova*, the Ninth Circuit stated in relevant part:

> To show a due process violation, an alien must prove "not merely ineffective assistance of counsel, but assistance which is so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the fifth amendment due process clause." *See Magallanes-Damian v.* INS, 783 F.2d 931, 933 (9th Cir.1986); *see also Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir.2000) (alien must show error and substantial prejudice). In *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 1038, 145 L.Ed.2d 985 (2000), the Supreme Court held that where a defendant can show that there is a reasonable probability that he would have appealed but for counsel's deficient failure to consult with him about an appeal, prejudice is presumed. Although *Flores-Ortega* concerns a defendant's Sixth Amendment right to counsel, it sheds light on our inquiry under the Fifth Amendment right to due process.
>
> Like the habeas petitioner in *Flores-Ortega*, where an alien is prevented from filing an appeal in an immigration proceeding due to counsel's error, the error deprives the alien of the appellate proceeding entirely. And, as the Court stated in *Flores-Ortega*, this error "mandates a presumption of prejudice because 'the adversary process itself has been rendered 'presumptively unreliable.'" Id. at 1038 (quoting *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (addressing denial of counsel during a critical stage of a judicial proceedings)). The *Flores-Ortega Court* continued that it could not "accord any presumption of reliability to judicial proceedings that never took place." Id. We agree and conclude that the holding of *Flores-Ortega* applies with equal force to claims of ineffective assistance of counsel arising out of the Fifth Amendment right to due process. Applying the *Flores-Ortega* test to this case, we note that the Friends have shown that **Volkova would have timely appealed but for her counsel's error: they showed that the appeal was actually filed,**

and that due to counsel's error, it was filed one day late. We conclude that prejudice should be presumed and, therefore, that Volkova's counsel provided ineffective assistance.

Dearinger ex rel. Volkova v. Reno, 232 F.3d 1042, 1045 (9th Cir. 2000).

Like the present case, Petitioners' counsel filed the Petition for Review one day late.[1] Likewise, Petitioners would have timely filed their Petition for Review, but for "counsel's error." As such, this Court should find that Petitioners' Counsel "provided ineffective assistance," denying Petitioners a constitutional guarantee accorded to aliens under the Fifth Amendment right to Due Process. Because the Petitioners in their Petition for Review are directly challenging the adverse credibility findings by both the Immigration Judge and the BIA's subsequent affirming of those findings, asserting that both courts failed to properly rely on "substantial evidence" in making their determinations and even had contradicting evidence from two separate US government sources with respect to allegations of submitting fraudulent documents, it can not be easily determined that even if Counsel had timely filed their Petition for Review that the outcome in these proceedings would be the same before this Court. Petitioners' respectfully requests that they be given their chance to challenge the adverse credibility

[1] Petitioners' Counsel provided the Petition for Review to Federal Express courier service for overnight express delivery to the Eleventh Circuit's Clerk's Office on August 11, 2006, the filing deadline. August 12, 2006 was a Saturday, the day the Clerk would have received the Petition had it not been a Saturday. The next business day was Monday August 14, 2006, the day the Petition was actually filed and received by the Clerk.

findings below, which they would have been given, but for Counsel's ineffective assistance of counsel in failing to timely file their Petition for Review.

WHEREFORE PREMISES CONSIDERED, Petitioners respectfully requests that this Court reverse its prior Order dismissing Petitioners Petition for Review and allow Petitioners to proceed with their Petition for Review as being in the best interests of justice and constitutionally sound.

Respectfully submitted,

Noel H. Flasterstein
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 4th day of October 2006, by Federal Express courier service to:

Anthony P. Nicastro
& David V. Bernal
US Department of Justice
Office of Immigration
Litigation PO Box 878 Ben
Franklin Station
Washington D.C. 20044

Federal Express Delivery:

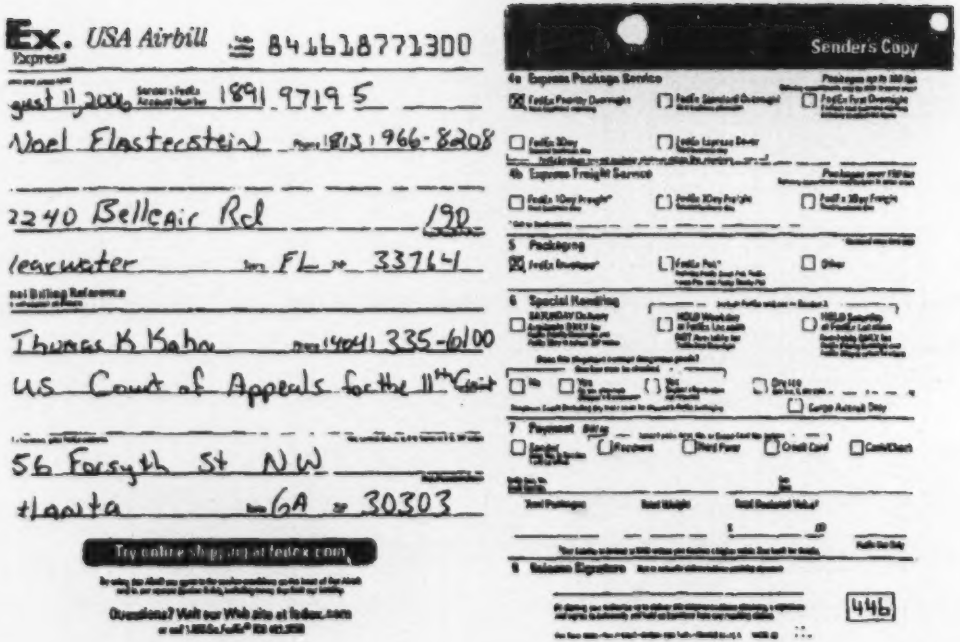
1331 Pennsylvania Avenue,
N.W. RM 1220-17N
Washington, D.C. 20004-1710

Noel H. Flasterstein

2240 Belleair Road, Suite
190 Clearwater, Florida
33764

(727) 536-2100 TEL
(727) 536-2110 FAX
noel@lirotlaw,com
Attorney for Petitioners

EXHIBIT A



Ex. Express USA Airbill 841618771300

Sender's Copy

gust 11, 2006 Sender's FedEx Account Number 1891 9719 5

Noel Flastecstein Phone (813) 966-8208

2240 Bellcair Rd 190

Clearwater State FL ZIP 33764

Your Billing Reference Information

Thomas K Kahn Phone (404) 335-6100

US Court of Appeals for the 11th Circuit

56 Forsyth St NW

Atlanta State GA ZIP 30303

4a Express Package Service

FedEx Priority Overnight

FedEx Standard Overnight

FedEx First Overnight

FedEx 2Day

FedEx Express Saver

4b Express Freight Service

FedEx 1Day Freight

FedEx 2Day Freight

FedEx 3Day Freight

5 Packaging

FedEx Envelope

FedEx Pak

Other

6 Special Handling

SATURDAY Delivery

HOLD Weekday at FedEx Location

HOLD Saturday at FedEx Location

7 Payment Bill to

Sender

Recipient

Third Party

Credit Card

Cash/Check

Total Packages

Total Weight

Total Declared Value

Try online shipping at fedex.com

Occasions? Visit our Web site at fedex.com

8 Release Signature

446

APPENDIX C - Order Denying Motion for Reconsideration (And Rearing)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-14376-A

PETRIT NDRECA,
a.k.a. Xhafer Gorja,
ENGLANTINA NDREU,
a.k.a. Elmoza Gorja **Petitioners,**

versus

U.S. **ATTORNEY GENERAL,** **Respondent.**

On Petition for Review of a Final Order of the
Board of Immigration Appeals

[Filed Nov. 7,2006]

Before BIRCH, BLACK, and BARKETT, Circuit Judges.

BY THE COURT:

Appellants's October 5, 2006, motion for reconsideration of our September 14, 2006, order dismissing this appeal for lack of jurisdiction, is DENIED.

APPENDIX D - Order Dismissing Appeal In the Board of Immigration Appeals

U.S. Department of Justice **Decision of the Board of Immigration Appeals**
Executive Office for Immigration Review

Falls Church, Virginia 22041

[Filed July 12, 2003]

Files: A79 662 565 –Bradenton
A79 662 566

In re: PETRIT NDRECA a.k.a. Xhafer Gorja
ENGLANTINA NDREU a.k.a. Elmoza Gorja

IN REMOVAL PROCEEDINGS

APPEAL

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willfiil misrepresentation of a material fact (both respondents)

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] Immigrant - no valid immigrant visa or entry document (both respondents)

ON BEHALF OF RESPONDENTS: Noel H. Flasterstein, Esquire

ON BEHALF OF DHS: Rook Moore
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. The respondents appeal the immigration judge's August 25, 1005, denial of their applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U. S.C. § § 1158,1231(b)(3), and protection under the Convention Against Torture. The respondents' appeal is dismissed.

We adopt and affirm the decision of the Immigration Judge insofar as she found the respondents not credible. *See Matter of Burbann*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). We find that the Immigration Judge's adverse credibility finding is sufficiently supported by the record and the respondents have failed to establish that such finding is clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter ofR-S-H-*, 23 I&N Dec. 629 (BIA 2003). The Immigration Judge identified a material discrepancy in the respondents' testimony which goes to the heart of their claim (I.J. at 22-26). We note that the lead respondent testified that his wife received three threatening telephone calls; however, his wife testified that she received threatening telephone calls on a daily basis in 2001 (Tr. at 76, 106-07). Furthermore, we note that the A79 662 565 et al. respondents submitted fraudulent documentation in support of their applications. A report from the Forensic Document Laboratory indicates that some of the documents submitted were not what they purported to be (Exh. 4). The respondents later submitted letters from the United States Embassy in Tirana, Albania, authenticating some of these documents (Exh. 10). However, we note that not all of the documents were authenticated, including the Democratic Party membership cards for the lead respondent and his wife. The respondents failed to adequately address these issues on appeal. Without credible testimony, the respondents cannot meet their burden of establishing they suffered past persecution or have a well-founded fear of persecution.

Accordingly, the respondents' appeal is dismissed.

FOR THE BOARD

Appendix E - Immigration Judge's Order of Removal

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Bradenton, Florida

File A 79 662 565
A 79 662 566

August 25, 2005

In the Matter of

PETRIT NDRECA,	)	IN REMOVAL PROCEEDINGS
INGLENTINA NCREU,	)	
Respondents	)	

CHARGE: Section 212(a)(6)(C)(I) of the Immigration and Nationality Act as amended as an alien who by fraud procured a visa or other documentation for admission into the United States.

Section 212(a)(7)(A)(i)(I) of the Immigration and .Nationality Act as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid, unexpired immigrant visa or other entry document.

APPLICATION: Asylum pursuant to Section 208 of the Immigration and Nationality Act, withholding of removal pursuant to Section 241(b)(3)(A) of the Immigration and Nationality Act and withholding of removal under the Convention Against Torture, 8 C.F.R. Section 1208.16m).

ON BEHALF OF RESPONDENTS:

Noel Flastersteim
777 S. Harbor Island Blvd.
Tampa, FL 33602U.S. DHS

ON BEHALF OF DHS:

Rick Moore
Assistant Chief Counsel

[Filed August 25, 2005]

ORAL DECISION OF THE IMMIGRATION JUDGE

I. STATEMENT OF THE CASE

On October 3rd, 2001 the United States Department of Homeland Security (herein Department) issued a Notice to Appear

(NTA) in the name of respondents. See Exhibits 1 and 1A. In the Notice to Appear, the Department alleges that respondents are removable pursuant to Sections 212(a)(6)(C)(i) of the Immigration and Nationality Act as amended and that as aliens who by fraud or willfully misrepresenting a material fact sought to procure a visa or other documentation or admission into the United States or other benefit provided under this Act and Section 212(a)(7)(A)(i) of the Immigration and Nationality Act as amended as an immigrant who, at the time of application for admission, is not in possession of a valid, unexpired government visa, re-entry permit, border crossing card or other entry document required by the Act and a valid, unexpired passport or other suitable travel document or document of identity and nationality as required under the regulations issued by the Attorney General under Section 211 of the Act. The issue of removability was resolved at earlier hearings where respondents, through counsel, acknowledged proper service of the NTA, admitted and conceded the charges of removability. Based on the evidence of record and the admissions of respondent, this Court finds that removability has been established by clear, unequivocal and convincing evidence. See Section 240(c)(3)(A), removal and Woodby v. INS, 385 U.S. 276 (1966).

Respondents are seeking relief in the forms of asylum and withholding of removal pursuant to Sections 208 and 241(b)(3)(A) of the Act and 8 C.F.R. Section 1208.16m) in

to their native country of Albania. The respondents' application for asylum and withholding of removal, Form I-589, was filed with the Immigration Court it appears in Orlando, May 1st, 2002. See Exhibit 2. The Court sent the asylum application to the State Department on September 9th, 2002 but there's no response from the State Department on the record.

The hearing on the merits of respondents' request for relief from removal was held on August 25th, 2005. At that hearing both respondents testified in support of the application and they presented the testimony of an expert witness. And they also presented documentary evidence that will be detailed below. The Department submitted evidence but did not submit witnesses or have any testimony.

II. EXHIBITS

Exhibit 1 is the Notice to Appear in both files. Exhibit 1A is a sworn statement from respondent in 545. Exhibit 1B is a credible fear worksheet for respondent in 565. Exhibit 2 is the 589 which is in th name of the respondent 566. Exhibit 2A are tabs A through M from respondent. Exhibit ZB is the frivolous warning. Exhibit 3 is a Department of State report and articles for 2001 and 2002, submitted by the Government. Exhibit 4 is a forensic report submitted by the Government. Exhibit 5 is a Department of Homeland Security witness list. However, that witness was not used. Exhibit 6 is a motion to continue for

authentication of documents that were submitted by respondent. Exhibit 7 is a change of venue order from Orlando to Bradenton. And Exhibit 8 is a change of venue order from Atlanta to Orlando. Exhibit 9 is a motion from respondent in 565 admitting and conceding removability. Exhibit 10 are tabs A through E from respondent. The Court notes that originals are not included in Exhibit 10 and were not available the day of the hearing. Exhibit 11 is the country condition report for Albania for 2003. And then Exhibit 12 is the country condition report and the religion report from Albania for 2004 and the Profile of Asylum Claims and Country Conditions for Albania for 2001. However, the copy of that report at Exhibit 12 is not complete. That report's also included at Exhibit 11 for 2001 and it is complete at that Exhibit. Exhibit 13 is a curriculum vitae for the expert witness offered by respondent. However, this curriculum vitae was not made available by the respondent until the middle of the hearing after that expert witness had testified

III. STATEMENT OF THE LAW

Under Section 208 of the Act the Attorney General, through an Immigration Judge, may grant asylum as a matter of discretion to an individual as a refugee as that term is defined in Section 101(a)(42) of the Act. This provision requires that respondents show that he his unable or unwilling to return to his native country and unable or unwilling to avail himself of the

protection of that country because of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. See Section 101(a)(42) of the Act. See also INS v. CardozaFonseca, 480 U.S. 421 (1987).

Applications for asylum must be filed within one year of the last arrival of the applicant to the United States.

Statutory eligibility for asylum can be established by showing past persecution. If an applicant establishes that he has been persecuted in the past for one of the five grounds enumerated in the statute, he is eligible for a grant of asylum. The likelihood of present or future persecution then becomes relevant in the exercise of discretion and asylum may be denied as a matter of discretion if there is little likelihood of present persecution. Matter of Chen, 20 I&N Dec. 16 at 18 (BIA 1989).

Persecution is not defined in the Act but includes the actual infliction of physical harm, confinement, torture and severe economic deprivation constituting a threat to an individual's life or freedom. See INS v. Stevic, 467 U.S. 407 (1984). Persecution will provide a basis for asylum if it is inflicted at the hands of either the government or a group which the government is unable or unwilling to control, See McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981).

In order to establish a well-founded fear of

authentication of documents that were submitted by respondent. Exhibit 7 is a change of venue order from Orlando to Bradenton. And Exhibit 8 is a change of venue order from Atlanta to Orlando. Exhibit 9 is a motion from respondent in 565 admitting and conceding removability. Exhibit 10 are tabs A through E from respondent. The Court notes that originals are not included in Exhibit 10 and were not available the day of the hearing. Exhibit 11 is the country condition report for Albania for 2003. And then Exhibit 12 is the country condition report and the religion report from Albania for 2004 and the Profile of Asylum Claims and Country Conditions for Albania for 2001. However, the copy of that report at Exhibit 12 is not complete. That report's also included at Exhibit 11 for 2001 and it is complete at that Exhibit. Exhibit 13 is a curriculum vitae for the expert witness offered by respondent. However, this curriculum vitae was not made available by the respondent until the middle of the hearing after that expert witness had testified

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In order to establish a well-founded fear of

persecution the alien must show that he possesses a belief or characteristic that a persecutor seeks to overcome in others by means of punishment of sort, that the persecutor is aware or could become aware that the alien possesses this belief or characteristic, that the persecutor has the capability of punishing the alien and that the persecutor has the inclination to punish the alien. Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

The well-founded fear standard requires a showing that the fear of persecution is based on the reasonable possibility that such harm will occur. INS v. Cardoza-Fonseca, 480 U.S. 421, (1987), INS v. Stevic, 467 U.S. 407 (1984).

The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in Section 101(a)(42) of the Act. See Matter of Moaharrabi, 19 I&N Dec. 439 (HIA 1987); 8 C.F.R. Section 1208.13(a). One of the five protected categories should be at least one central reason for the persecution.

In some cases, the only available evidence of the alien's subjective fears may be his own testimony. It can suffice where it's believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis for the alien's fears. Matter of Mogharrabi, 19 I&N Dec. 439 at 445 (HIA 1987).

In Matter of Dass, the Board held that an asylum

applicant bears the evidentiary burden of proof and persuasion. Where there are significant, meaningful evidentiary gaps applications for asylum will be ordinally denied for failure of proof. Further, where it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant's claim, such evidence should be provided or an explanation shall be given as to why such information was not presented. See Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997).

Withholding of removal

The application for asylum also serves as an application for withholding of removal. In order to establish eligibility for withholding, respondent must show that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion in the country designated for removal. See Section 241(b)(3)(A) of the Act. This statutory provision requires that respondent demonstrate a clear probability of persecution on one of the five ground enumerated in the Act. See INS v. Stevic, 467 U.S. 407 (19B4). This clear probability standard requires a showing that it is more likely than not that the alien would be subject to persecution. The standard for withholding of removal is more stringent than that of asylum. See INS v. Stevic, 467 U.S. at 429-30 (1984).

Torture Convention Relief

For asylum applications after April 1st, 1997, an applicant may be eligible for withholding of removal under the Convention Against Torture if it's requested of if there's evidence to indicate that torture may exist in the country of removal. See 8 C.F.R. Section 1208.13°)(1).

The applicant for withholding of removal under the Torture Convention bears the burden of proving that it's more likely than not that that he or she would be tortured if removed to the proposed country of removal. See 8 C.F.R. Section 1208.16[11])(2).

IV. EVIDENCE CONSIDERED

The Court considered the testimony of three witnesses. The Court considered the testimony of Graden Tonstel who was presented by respondent as an expert in the country conditions in Albania. Although there is a curriculum vitae for professor Tonstel at Exhibit 13, it was not submitted to the Court until after professor Tonstel had testified. Based on questions by respondent's counsel and Government's counsel, professor Tonstel was asked to prove up his credentials.

Based on his testimony on his credentials, the Court accepted him as an expert for purposes only of general information about the Balkan nations and including Albania and accepted his testimony as limited only to differences that he had

in his opinions on Albania that differed from the State Department reports. Dr. Tonstel's testimony is summarized below.

He testified on general history of Albania and there was still animosity between the parties but that things had settled down there. Those parties were identified as the Socialist Party and the Democratic Party. He testified that Socialists are currently in control of Albania. He testified that the Muslim religion dominates the population and that Christian and Muslim cities may face some discrimination. He testified that the judicial system is corrupt and that administration is corrupt. He testified that the police and the military are corrupt.

He testified that human trafficking is a problem, that trafficking women is a problem in Albania and that women are often taken to Italy and through there to North Africa.

He testified that the country of Albania is primarily run by clans. These are large families that people belong to that some are very large family clans may be able to impose themselves, their influence on authorities, that they may in some places control the police. He testified that it's not safe for Americans in Albania and in most places in major cities in Albania it's not safe for Albanians.

He testified that since the pyramid scheme in 1997 when many Albanian lost their life savings and the war in Kosovo, that thousands of weapons have disappeared into Albania.

The Court also considered the testimony of both respondents. The testimony of the lead respondent is to summarize below.

The respondent is the husband in this couple. The husband testified that he had a fear of returning to Albania because of the possible kidnaping of his wife to be forced into trafficking or prostitution. He testified that she had received two phone calls that upset her dealing with forcing her into prostitution. He testified that on the third phone call he answered it and they called him by name and said that he should stay out of the business of prostitution with the wife and if he didn't they would kill him.

He testified that he said he was going to help his wife. He testified that he called the police and the police stated they would take care of it but nothing has been done. He testified that these problems occurred in 2001. He testified that then two people called him by name on the street and said to stay out of the business with his wife and he then said that he would protect her and they threatened to kill him. He testified that that occurred on June 22nd, 2001.

He testified that on September 5th, 2001 he and his wife were on the way to the store when four or five people accosted them and tried to pull his wife away from him by her arm. He testified that he and his wife responded by trying to pull his wife away and by hitting the attackers. He testified

that they escaped and went to her uncle's home and then came to the United States. He testified that during the time that they waited after that attack to come to the United States it was about three weeks and they moved from family to family during that time, trying to hide.

He testified that after the June 1st event he did contact the police and told them about the phone calls but they saw no outcome. He testified that after the second incident he did not contact the police because they never helped and that they were corrupt and that they were connected to the Socialist state. He testified that he thinks the police are some of the main ones involved in the trafficking because they take bribes.

He testified that he was afraid to return because his wife would be put into trafficking and that his children would be taken away and sold for their organs and that the police would not help.

He testified that he entered the United States on September 26th, 2001 through Atlanta on a fraudulent visa with a fraudulent passport. He testified that he did not know how much he paid for the visa and the passport but he did purchase it in another city. He testified that he knew it was a large amount but his main concern was getting out of the country. He testified that in Albania he worked in construction.

When asked if he remembered that he paid $12,000 for the visas and the passport he said, no, he was not sure of the

amount. When asked why he said earlier in statements to the Government that he paid $12,000 he said that he didn't remember. he testified that he needed the United States government had (indiscernible) some of his documents from him but that he had had them tested again and that they were genuine. He testified that he got these other documents from stat or official offices and he did not get them from the same person who sold him the visas or the passports.

He testified that he and his wife were able to escape during the 9/5/01 attack because his wife hit one of the attackers in the face and the others were busy trying to help that one and he and his wife escaped, flagged a cab.

He testified that he had traveled out of Albania, going to Greece and Italy to work and that he's also been through South Africa.

He testified that he had not requested asylum in any of these other countries. He testified that he has a brother-in-law in South Africa but that it would be best for him to come to the United States because it was the safest place where he could get asylum.

He testified he did not know how the men who called or accosted him knew his name and he testified that the men who accosted him were not wearing uniforms, that they had no arms that were showing and that although he knew they were government officials he did not testify as to how he knew this.

He testified that he borrowed money to pay for the

fraudulent visa and passports. He testified that he borrowed the money from his wife's father.

The Court also considered testimony of the wife, whose name is Inglentina Nereu. A summary of her testimony is below. She testified that people wanted to take her to sell her as a prostitute. She testified that she got phone calls beginning in June 2001 and they called her by her name. She testified that they knew who she was but she did not recognize the voice. The first time they called she hung up. She said the next day they called again and she got many phone calls. She testified that on the second call the man told her that we could bot get rich if you would go with me to be a prostitute. She testified that she got phone calls almost daily.

She testified that on September 5th, 2001 four or five people approached her or her husband and grabbed her by the arm and told her that she was going to have to go with them. She testified that her husband grabbed her other arm, that the men hit them and that they hit back and that she hit one man with her handbag. She testified that she doesn't know how they escaped, that they were both fighting back. They ran to a cab and they went to escape to be with an uncle of her husband's. She testified that that uncle's name was Samat.

She testified that she did not know how often kidnaping from trafficking happened but that her best friend was beaten in front of a school and that lots of girls in her school

whose names she didn't know were also kidnapped or beaten. She testified that they contacted the police but got no help. She testified that her step-sister had been shot but the police were not helping on that. She testified that the police were no help because they themselves are involved in trafficking and that the government is owned by (indiscernible).

She said that she never went back to her home after that incident on September 5th, that they moved all over Albania trying to stay safe, that they paid a lot of money to get to the United States.

She testified that she thought they paid about $12,000, that they owed it to her father because they borrowed it from him. She testified that 15 days later they went to America, that they left Albania on September 20th and got to the United States on September 26th. She said that she was afraid to return because she would be a victim of trafficking and that someone would take her kids. That she has one child already and another on the way.

She testified that her father and mother had left the country before here and were still in proceedings for asylum.

She testified that she did enter with a fraudulent passport and visa and that she did not go through normal channels because they would not give her a visa to the United States. she testified that she did not try to go anywhere else and that she knew her husband had been to Greece and Italy but she did not try

go to there and had never visited her brother in South Africa. They had been to South Africa once but that was when they were there for four days on their way to the United States, where they visited with friends.

She said that she had asked the officials of Albania for a travel document before when she tried to leave the United States as a student but this was before she had been attacked. She said she was not allowed to leave with her family because the country did not give family visas.

She said that she meant to say that when she left the attack that she and her had fled to her uncle, not his uncle, that she misspoke when she said earlier when she said that they went to his uncle's.

When asked why these men were so intent on kidnaping her she testified that it was because her family was closely involved in the Democratic Party and that her family had always been persecuted. That they had been fired from jobs and were not allowed to go to school, that her mother was a leader in the Persecuted Women of Albania, her father was an election official and had been offered bribes by the Socialists to fix the election in 1997. She said she was targeted because of her parents and revenge on her parents.

She testified that she had one sister in the United States, one sister in the United States, one brother in South Africa and a sister-in-law in South Africa and her parents were

in the United States.

When asked by the judge if revenge was a custom in her country and was a part of the Albanian history she said it was, that revenge was a big thing in her country. She testified under redirect from her attorney that people wanted revenge but they also wanted to put her into prostitution for money and that they would take organs from children for money and that it was more about the money than anything.

When asked why her husband said she got three phone calls and she said she got many daily and that her statement to the I-589 says she got many phone calls she said that the others were not as frightening as the three that she had mentioned and that her husband had mentioned. She testified that the people that called her knew her because it was a small city and they also knew her parents and they knew that her parents were gone. She testified that her parents left Albania December 2000.

She testified that she never asked for asylum in South Africa or Turkey, where she went through on her way to the United States, because her parents were here.

The Court also considered the applicant's 589, which is summarized below. The I-589 was in the name of Inglentina Nereu, the wife in this couple. And the 589 states that the respondents were seeking asylum under religion, political opinion and membership in a particular social group.

In the statement attached to the I-589 respondent says

that in June of 2002 she began to receive threatening phone calls from an unknown individual. These phone calls were disturbing to her and in the statement she says that the caller proclaimed his love for her and explained that he wanted to take her to Italy where the two of them could make a significant amount of money if she would agree to enter into prostitution. She stated that a few days later she received another call. This time the caller asked to speak to her husband by name. The caller threatened her husband with physical harm and warned her not to interfere with the caller's plans to make her a prostitute in Italy. From that point on she states they begin to receive phone calls daily.

She says they went to the police but got no help. And then decided to try again. But she states that she believes the police in her country are corrupt. She says in her statement that her husband told her the police stopped by a number of times.

Then she states that on June 22nd, 2001 two men not known to her husband confronted him as he was returning from a visit to his parents. She states they called him by name and told him not to interfere with their plans, but he was able to run away. Based on that she says they began to move around the country.

Then she states that on September 5th, 2001 she and her husband walked into the market when four or five young men approached them and one grabbed her by the arm and said you're

coming with us. She states that her husband grabbed her away from them and they began to struggle and they ran away as soon as they could.

She states that she was a member of the Democratic Party, her family had a strong history with the Democratic Party. So for that reason she thinks she was a primary target for enslavement, prostitution and torture.

She states in her I-589 that criminal gangs force women into prostitution but that they do so with the permission of the police who they pay off with bribes.

She states that she also fears persecution in her country because of her belief in the Catholic faith, that the majority of Albanians are Muslims and that Catholics are discriminated against.

She states that her father was placed on house arrest for political agitation propaganda and was very active (indiscernible) Democratic Party. She states that her husband was arrested and placed in jail for a month for participation in a democratic organization.

She states that both her parents were active in the Democratic Party, that her father served as a polling facilitator and that her father was often sought out to be bribed by Socialist Party members. She stated that her mother was very active in the Persecuted Women's Association of Albania.

She also states that her husband served in the

Albanian military for one year as a cook.

The Court also considered the following documentary evidence. The Court considered the country condition reports for Albania from the U.S. Department of State on Human Rights Practices for 2001, 2003 and 2004. The Court also considered the Profile of Asylum Claims and country conditions for Albania from the U.S. Department of State for 2001. And the Court gave great weight to these reports from the U.S. Department of State.

In addition, the Court considered a report from the forensic lab of the U.S. Department of Justice at that time when the Immigration and Naturalization Service at Exhibit 4, in which the forensic lab technicians or document examiners indicated that documents that they referred to as Exhibit 1, 5, 10 and 16 could not be authenticated. According to the Department of State, the forensic lab checked with multiple versions of family certificates such as those are issued for each city in Albania and the lab did not have comparable samples. However, the lab reports that these documents do not confirm to the verified, genuine known samples that are on the files from officials in Albania.

The forensic document report went on to say that Exhibits 2, 3, 4, 12 and 14. These evidentiary numbers relate to the first page of the forensics lab document at Exhibit 4, which identifies the numbers that I am stating in the decision. The forensic lab states that Exhibits 2, 3, 4, 12 and 14 are probably

not what they are purported to be, and those documents are official documents from the Republic of Albania. The documents, according to the lab, lack diacritical marks. It's highly irregular for diacritical marks to be missing in a document prepared in the Albanian language and used for communication in Albania. The lab reports that the absence of diacritical marks may cause confusion or misinterpretation, since diacritical marks are used to provide emphasis and meaning to certain letters or combinations of letters.

The report goes on to say that Exhibit 6, 7, e, 11 and 15 are not what they are purported to be Exhibit 6 an 7, which are purported to be official documents from Albania, have been altered significantly, as far as the data entries are concerned. Exhibits 8 and 15, which are Democratic Party membership documents and Albanian marriage certificates do not conform to any genuine known sample on file in the forensic lab. And grade records in Exhibit 7 and 11, which are purported to be education grade records for several years in Albania, were apparently prepared at one sitting by the same writer. Exhibits 9 and 13 cannot be authenticated because of the ease of counterfeit reproduction.

And this report was submitted by David Sexton, supervisor forensic document examiner at what was then the INS forensic document lab. The Court understands that Mr. Sexton was also available for testimony if needed. The Court notes that in

his closing arguments respondents' counsel argues that Government did not make Mr. Sexton available to be cross-examined. But the Court does note also that the respondent's counsel could have requested Mr. Sexton's appearance, either in person or by telephone, and he did not do so. Therefore, the documents that respondents have submitted, which purport to be official documents from agencies in Albania are given very little weight.

The Court notes that respondent did ask for time to get their own forensics expert to review these documents and they did so and they did submit, at Exhibit 10, five of the documents that had been in question and had these documents authenticated by the U.S. consulate in Tirana, Albania, saying that they had been true documents from Albanian officials. Those documents that the respondent had authenticated themselves were the marriage certificate of the couple, the school record fo the wife and husband and birth certificate of the husband. Because those five documents were authenticated by the consulate in Albania the court had considered those to have more weight than the rest of the official documents presented by the respondents. However, those documents that respondent did have authenticated before they were submitted to the Court the second time were not determinative in any decision made by this Court.

The Court also considered at Exhibit 13 the curriculum vitae submitted to the Court by the respondents for the background on their expert witness. However, this Court notes

that the curriculum vitae was not made available until the middle of the hearing after the expert has testified. And so it is, therefore, given little weight.

The Court does note, however, that after voir dire the expert witness, the Court allowed him to testify in certain limited areas and did accept his expertise as a professor of
Balkan history and including Albania.

V. CREDIBILITY

The Court found the expert witness to be credible in the limited area that he was asked to testify to and the Court did consider, with some limited weight, the expert witness's description of those parts of the U.S. Department of State report that he did disagree with . However, the Court did give more weight to the Department of State reports where there was differences between the expert witness testimony and the Department of State report.

The Court did not consider either of the respondents' testimony to be credible. The lead respondent and his wife differed in several ways with each other between their testimonies. For example, she said that they had received many calls almost daily. The lead respondent, the husband testified that they received three phone calls. Neither respondent was able to clearly articulate how they escaped four or five young men when the young men grabbed the wife by the arm and tried to

drag her away.

Their testimony was internally consistent with themself and they were inconsistent with each other. The lead respondent testified that his wife hit one of the men in the face with her purse and they were able to escape. However, he had also testified that one of the men had grabbed her by the arm and he grabbed her by the other arm and they were pulling her between them. So it was not clear how she had an arm free to use it to swing her purse.

He testified that they were able to get away when she hit one of the men and the others came to his aid. And she testified that she doesn't know how they got away, that there was confusion and they escaped, but she was unclear how.

After that escape he testified that they went to her uncle's house. She testified that they went to his uncle's house. She later, when asked about this discrepancy, said that she had misspoken and that she now agreed with her husband, that they had gone to her uncle's house.

He did not remember the amount of money that was spent on the visa and a passport. She remembered that she thought it was $12,000 but was not clear on whether she remembered it accurately or not. The Court finds that $12,000 would be a large amount of money and would probably be an amount that would be remembered. However, the Court will not assume that that amount of money would be remembered. The Court only comments on the

differences between respondents' testimonies.

Their testimonies differed from the application in several ways. The application states that there was a number of phone calls, almost daily. The lead respondent, the husband, testified there were three phone calls. The application differs in what was said on the phone calls as what was testified to. The wife and this couple testified on the stand that the callers called her by name and said that they knew who she was. She didn't mention in her testimony that she said they loved her in her statement. On her I-589 she said the caller said he loved her and that they should go to Italy together where they would make a lot of money. She did testify that the caller wanted her to go to Italy.

In her statement she said that the caller asked for her husband. In his testimony the husband says that he picked up the phone on the third call. In his testimony he said that they called the police but they did nothing. In her testimony shad said that they called the police once and got no help. But in her statement on the I-589 she says that they called the police more than once and that the police came by their house several times.

In her statement the wife in this couple says that after the June 22nd, incident where her husband was accosted on the street by two men, that they started to move around Albania a great deal. But in testimony she and her husband indicated they

testified that they moved around the country a great deal after the incident on September 5th.

In her statement the wife states that her husband was in the military. Her husband did not testify to any membership in the Albanian military.

In her statement the wife says that her husband had been detained for one month. In his testimony respondent did not testify about a detention by the Albanian government.

The Court also finds the respondents' testimony to be lacking in credibility because it did not describe the incidents in a great deal of detail and in some parts of the testimony from the wife, instead of answering questions she would repeat the question. She sometimes did not answer at all when asked a question.

Although respondents claim that their treatment by these people who threatened her with prostitution was for her membership in a particular social group, during their testimony they both consistently that these actions were taken for financial reasons, that Albania was poor country, people preyed . on each other for money. And also the wife testified that revenge and actions taken against family members or revengeful purposes was a common thing in Albania. And she testified that she believes she was targeted for prostitution because of actions that her parents had taken. She described these actions as political in nature and, for that reason, she was targeted.

However, it appears to the Court that her being targeted for kidnaping for prostitution was either a criminal act or an act of revenge for personal reasons.

For those reasons, respondents lacked in credibility and the Court gave their testimony little weight.

VI. FINDINGS OF FACT

The Court does find that respondents' application for asylum was submitted in a timely manner and, therefore, was considered for asylum and withholding and Convention Against Torture relief. The Court finds that respondents are married. The Court finds that respondents are from Albania. And the Court finds as fact that respondents did receive threatening phone calls and were accosted at least twice on the streets of the city where they lived in Albania.

However, the issues in this case that needed to be addressed in order to make a claim for asylum were that respondent Inglentina was a member of a particular social group. Although respondents had marked three different categories on their I-589 as being reasons that they were seeking asylum, those being religion, political opinion and membership in a particular social group, at the hearing on the merits the respondents' counsel indicated that they would be seeking asylum based on the wife's membership in a particular social group and that particular social group was described as young, beautiful women who were

targeted for recruitment for prostitution.

And while the Court finds that respondent Inglentina is indeed young and beautiful, the Court does not find that it has been proven that she was recruited for prostitution nor does the Court find that a particular social group has been established or recognized or otherwise persuasively set out as young, beautiful women targeted for prostitution. And that group has not received protection under the asylum laws of the United States. For that reason the Court finds that the asylum claim fails. That is one of the reasons that the Court finds that the asylum claim fails.

The Court also finds that respondents were not targeted for mistreatment due to any reason that's covered by the asylum laws of the United States. The respondents did not make a case that they were persecuted for their religion, for their politics or for their membership in a particular social group. And as stated previously, the Court did not find respondents to be credible.

However, if the Court had found respondents to be credible and had believed everything that they said, this Court would still find that they had not made out a case for asylum, that there was no past persecution. Respondents were perhaps the victims of a crime and had received threatening phone calls and had been accosted once in the street and when the husband was alone and then once again in the street when the two of them were

together. However, no evidence was submitted other than respondents' testimony, that there was any harm to either of them through any of these encounters. There was no testimony or any evidence presented that anyone who did this harm to respondents were officials of the government or associated with the government or in any way, shape or form authorized by the government to act in such a way. In fact, the respondents had called the police and had gotten some response from the police in the city where they lived after they had received threatening phone calls.

Respondents did testify that they did not believe they could not rely upon the protection of their government. However, their government did respond, at least in part, according to their statement on the I-589. The police did come to their house to ask questions about threatening phone calls. After that the respondents indicated that they had not even called the police after they had been accosted on the street.

The Court finds that respondents may have fear of what happened to them in Albania and fear of returning to Albania, but the Court does not find that they have a reasonable fear of persecution because the Court has found that there was no persecution in the past, that the harm to respondents did not rise to that level and, therefore, the Court finds that they do not have a reasonable fear of persecution.

Legal Analysis

The Court does not deny that respondents do not want to return to Albania. However, considering the respondents' testimony, along with the Form I-589 and the materials submitted by the respondent that were deemed authenticated or reliable, this Court finds that their unwillingness of the respondents to return does not stem from perseLtion that they may face on account of any of the five enumerated grounds necessary for a grant of political asylum. The respondents have failed to show past persecution or a well-founded fear of persecution within the meaning of the Immigration and Nationality Act. INS v. CardozaFonseca, 480 U.S. 421 (1987); Matter of Moaharrabi, 19 I&N Dec. 439 (BIA 1987).

The Court does not find the respondents to be credible. However, if the Court had found the respondents to be credible, they had still failed to meet their burden of proof that anyone in Albania is interested in them, due to any of the five enumerated grounds for asylum. See Section 101(a)(42)(A) of the Act, Matter of Chen.

Generally harsh conditions shared by many other persons in the country do not amount to persecution. The Court does not deny that Albania is a dangerous place. There is a great deal of violent crime, extortion, kidnaping and trafficking in persons. However, those harsh conditions are shared by most people in Albania and do not single out respondents for any

reason that is a protected ground. And, therefore, those activities do not amount to persecution. See Tatarska v. INS, 978 F.2d 1 (1st Cir. 1992); Salinas v. INS, 916 F.2d 1257 (7th Cir. 1990); Matter of Zurziki, 13 I&N Dec. 261 (BIA 1969).

Conditions of political upheaval and civil unrest affecting the country's entire population do not establish persecution within the meaning of the Act. See Cirviatania v. INS, 767 F.2d 1387 (9th Cir. 1985) and Matter of Sanchez and Escobar, 19 I&N Dec. 276 (BIA 1985).

Respondents testified credibly to the violence and upheaval in their country and the expert testimony from the witness presented by respondent was credible in that Albania has been under a great deal of turmoil throughout most of its history and that at this point the Government doesn't function well. But the government is elected democratically and does make attempts to stop the crimes involved in its populous.

Discriminatory treatment in the form of job demotion, salary deductions and loss of bonuses do not constitute persecution within the meaning of the INA. See Samala-Cortez v. INS, 761 F.2d 1259 (9th Cir. 1985).

The respondents testified that they were discriminated against because of their faith and their membership in a political party. The respondents' testimony as to being a member of the Democratic Party and their membership cards to not appear credible. But even if it had been credible and the Court had

believed that they were members of the Democratic Party, the Court finds that any discrimination that they may have faced because of that membership did not rise to the level of persecution.

Even if overt discrimination can be established the alien would then be required to show the discrimination was so pervasive and intolerable and either government directed or condoned as to be tantamount to persecution. This is in recognition of the fact that discrimination exists, to one extent or another, in every society. However, it is only that discrimination that is so invidious by whatever measure is used that will equate to persecution. See Matter of Salami, 11 I&N Dec. 536 (BIA 1966).

And the same analysis would apply to respondent's arguments that they were discriminated against because they were Catholic.

Fear of retribution of a purely personal matter also does not rise to the level of persecution required gor a grant of asylum. See Matter of Moaharrabi, supra; Matter of Pierre, 50 I&N Dec. 461 (BIA 1975).

Respondent Inglentina testified that she believed that many of th actions taken against her was in response to actions taken by her parents, that she was being sought as an object of vengeance or revenge on her parents. And she testified that revenge was a large part of the Albanian culture and history.

And the expert also gave testimony to this as did the State Department reports. However, these personal vendettas or vengeance to not rise to the level of persecution for purposes of an asylum grant.

INS v. Elias-Zacarias, 503 U.S. 478, 112 S.Ct 812 (1992) states that the Supreme Court's holding that forced recruitment by guerilla forces without a showing that such recruitment was motivated by one of the grounds enumerated in the statute does not establish eligibility for asylum.

Respondent testified that she was being recruited to be forced into prostitution and that that was because of her membership in a particular social group, that of young, beautiful women, and that she was also being targeted for that because of her faith and her political party membership. But Elias-Zacarias stands for the premise that forced recruitment without a showing that it's motivated by one of the grounds enumerated in the statute, does not establish eligibility for asylum.

The Court did not find credible the respondent's testimony that she was being forced into prostitution because of her faith or her political party membership. The Court finds if she were being forced into prostitution it was because it was a crime that was perpetrated upon her and she was the victim of a crime.

Even if I had found the respondents' testimony to be credible regarding Albania and regarding their treatment there,

and regarding their membership in a particular social group, I would not conclude that they have any present of persecution if they were to return now to Albania given the following changes in circumstances. There have been free, democratic elections since they left. There are attempts on the part of the Albanian government to stop the trafficking in women and in children. The Albanian government has accepted the help of non-governmental organizations and outside entities to stop the trafficking in women and in children. And there is at least some progress being made in Albania in that regard.

So even if respondents were found to be credible, and even if the Court had found that the wife had been targeted for prostitution, I do not now conclude that she and he have any present fear of that happening again because those changes that have happened in their country's government and in the country's attempt to enforce the laws against trafficking.

Given the foregoing, I find that there would no longer exist any basis for their applicant's claims that they have a well-founded fear of persecution by the Albanian government due to membership in a social group.See generally Matter of Chukamerjai, 15 I&N Dec. 520 (BIA 1975).

Even upon the showing of changed country conditions, an Immigration Judge has the discretion to grant asylum upon humanitarian grounds where the past persecution was so severe that return to the country of persecution would be inhumane. In

re H-, Int. Dec. 3276 at 17, and Matter of Chen, supra, at 19.

The past persecution alleged by respondent in this case does not rise to the level for a grant of asylum application on humanitarian grounds. Nor is the Court persuaded that respondents' past experiences in Albania were of such nature as so would fear a person with distress and association with his native country that it would be inhumane to force him to return there, even if there is no longer in danger of further persecution. Skylak v. INS, 944 F.2d 364 (7th Cir. 1991).

While these experiences related by respondents were no doubt productive of fear in their lives, they were not of such severity to render their future to Albania as an inhumane event.

The term persecution, while not defines in the Act, contemplates harm or suffering inflicted on an individual in order to punish him or her for possessing a belief or characteristic a persecutor seeks to overcome. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985). The word does not embrace harm arising out of civil strife or anarchy.

I believe that the civil strife and anarchy in Albania in faced by the entire population and that respondents themselves have not been singled out for that treatment. As the Board noted, civil wars or revolutions historically have always contained strong currents of violence, threats, destruction, intimidation and ruthfulness. This Court finds that the same is true of countries that are going through economic and social

upheaval. Individuals harmed by such violence or threats or harm in those situations are not necessarily persecuted on account of any of the five categories enumerated in Section 101(a)(42)(A) of the Act.

As to the claim of protection under the Convention Against Torture, the Court finds that there was no testimony given to indicate that either respondent was tortured by anyone, much less the government of Albania or anyone with the permission of the government of Albania. Since there was no testimony or no information submitted in any form, the Court does not have to make a credibility finding in the Convention Against Torture claim.

CONCLUSION

After a careful review of the record, the Court finds that the respondents' testimony was not sufficiently detailed, consistent or believable to provide a plausible account of the basis for their fears and, thus, cannot suffice to establish their eligibility for asylum without corroborating evidence or some evidence that they were members of a protected class.

Inasmuch as the respondents failed to satisfy the lower burden of proof required for asylum, it follows that they also failed to satisfy the clear probability standard of eligibility required for removal. See INS v. Stevic, 467 U.S. 407 (1984). The evidence does not establish that if they were

now returned to Albania that it is more likely than not they would be subject to persecution on account of one of the grounds specified at Section 243(h) of the Act.

In light of the foregoing, considering all the testimony and documentary evidence of record, the following order will be entered:

ORDERED. WHEREFORE IT IS ORDERED that respondents' application for asylum pursuant to Section 208 of the Act be denied.

WHEREFORE IT IS ORDERED that respondents' application for withholding of removal pursuant to Section 241(b)(3)(A) of the Act be denied.

AND WHEREFORE IT IS FURTHER ORDERED that respondents' application for withholding of removal under the Convention Against Torture be denied.

WHEREFORE IT IS FURTHER ORDERED that respondents shall

be removed from the United States to Albania on the charges contained on the Notices to Appear.

August 26, 2005

GAIL PADGETT

United States Immigration Judge

A 79 662 565 37 August 25, 2005

CERTIFICATE PAGE

I hereby certify that the attached proceeding before GAIL PADGETT in the matter of:

PETRIT MDRECA
INGLENTINA NCREU

A 79 662 565
A 79 662 566

Bradenton, Florida

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Melissa Otero (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

February 10, 2006
(Completion Date)

QUESTIONS PRESENTED

The district court transferred the case below to the Court of Federal Claims because it involves a contract claim for more than $10,000.00. The Court of Federal Claims dismissed contract-related claims by summary judgment but held that it has no subject matter jurisdiction over tortious breach of contract claim, including breach of the covenant of good faith and fair dealing. The Federal Circuit Court of Appeals affirmed and denied a motion to transfer the case to district court. The questions presented are:

1. Whether the Court of Federal Claims has jurisdiction over tortious breach claims against the United States, including breach of the covenant of good faith and fair dealing as "a claim ... founded ... upon any express or implied contract" within the meaning of the Tucker Act, 28 U.S.C. § 1491(a).

2. If not, whether the Court of Federal Claims has a jurisdictional duty to consider a motion to transfer to the district court tortious breach claims.

3. Whether summary judgment should be reversed as to the dismissal of contract-based claims, including breach of contract, declaratory judgment, breach of statutory duties to meet contractual prerequisites to foreclosure under the Multi-Family Mortgage Foreclosure Act and, alternatively, inverse condemnation where privity is denied, where an underlying claim for breach of the covenant of good faith and fair dealing is stated but was not considered.

BEST

RULE 29.6

No parent corporation or any publicly held company owns ten percent (10%) or more of the stock of Petitioner Regatta Bay Limited.

ST AVAILABLE COPY

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Opinion, *Regatta Bay Limited v. United States*, United States Court of Federal Claims, No. 04-1403 C, filed January 5, 2006. (2a.[1]) Judgment, *Regatta Bay Limited v. United States*, United States Court of Appeals for the Federal Circuit, No. 06-5061, filed December 8, 2006. (1a.) Order denying rehearing, *Regatta Bay Limited v. United States*, United States Court of Appeals for the Federal Circuit, No. 06-5061, filed February 14, 2007. (12a.)

JURISDICTION

The Judgment of the Court of Federal Claims was entered on January 6, 2006. (14a.) The Court of Appeals for the Federal Circuit entered judgment on December 8, 2006. (1a.) The Court of Appeals for the Federal Circuit denied a petition for rehearing on February 14, 2007. (12a.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

28 U.S.C. § 1491(a)(1). (15a.) NRS 107.080(2) and (3).

---

[1] "__a" refers to the attached Appendix. "JA__ " refers to the Joint Appendix filed in the Federal Circuit Court of Appeals.

STATEMENT

The jurisdiction of the district court was invoked under 28 U.S.C. § 1346 because of a federal question under the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq, following denial of an administrative claim. (JA 971.) The district court transferred the case under 28 U.S.C. § 1331 to the Court of Federal Claims under 28 U.S.C. § 1491(a) because the case involves "a claim on an express or implied contract with the United States for more than $10,000." (JA 454.)

Petitioner, Regatta Bay Limited ("Regatta"), assumed the obligations under a Note, Trust Deed and Regulatory Agreement for rental of subsidized, low-income housing at the Regatta Bay Apartments in Las Vegas, Nevada, in 1983. The Regulatory Agreement obligated HUD to endorse insurance for Regatta's mortgagee. (JA 867.) HUD approved the use of Regatta's limited partnership agreement, which authorizes payment by Regatta to its General Partner, Phil Rosequist, on working capital loans authorized to be advanced by him for Regatta's use at the prime rate of interest.

Regatta provided the Department of Housing and Urban Development ("HUD") with monthly operating reports, annual certified audits, which show the working capital loans and repayments. Regatta paid its lender, Reilly Mortgage Group, Inc. ("Reilly") any required fees whenever Regatta was late on a monthly payment, upon receipt of notice and demand from Reilly, some twenty-three (23) times documented in the record. (JA 29-51.) In one instance, Reilly accepted late fees which were two years in arrears, whereas the accepted monthly payments are not documented in the record to have ever been more than

two months in arrears. (JA 49, 51.) Regatta borrowed and paid on a series of working capital loans made by the General Partner to Regatta under Regatta's limited partnership agreement. Such payments totaled more than $1,000,000.00 by 1993. (JA 855-859, 959.)

HUD's Inspector General conducted an audit of Regatta's books and records in 1993. The record discloses no finding by the Inspector General against Regatta of any wrongdoing concerning the payments on the working capital loan. (JA 454.)

On March 24, 2000, HUD sent Regatta a letter demanding within thirty (30) days repayment of the working capital loan payments in excess of $1 million dollars without explaining any legal basis for the retroactive demand to 1985. (JA 976-978.) The letter states:

> The failure to comply with any or all of the actions required herein [the payment within 30 days of more than $1,000,000.] could result in the suspension or abatement of any federal assistance, or the imposition of administrative, civil sanction or other corrective action the DEC [Departmental Enforcement Center] deems appropriate under the circumstances.

(JA 978.) Each of HUD's presented options to Regatta was unreasonable.

More than a year went by before HUD gave any breakdown of the one million dollar demand. In a May 3, 2001, letter, HUD for the first time specified that the dates of payment by Regatta to its General Partner for more than one million dollars were prior to the Inspector General's audit. (JA 958-960.) The May 3, 2001 letter shows that in its March 24, 2000, demand

HUD had recharacterized the previously HUD-approved working capital loan repayments as unauthorized withdrawals from project funds. HUD's March 24, 2000 demand for more than one million dollars acted as an equity burden, like a lien, thereby eliminating Regatta's ability to secure any additional working capital loans. HUD also knew, but did not disclose that each of the payments HUD alleged to be improper was more than six (6) years old.

After making the March 24, 2000, demand, HUD proceeded aggressively to take the property from Regatta. Although Reilly followed the sixteen-year course of performance of sending a late notice for Regatta's May 2000 mortgage payment, HUD suddenly instructed Reilly to accelerate and foreclose when Regatta was similarly late the next month with its June 2000 payment without Reilly sending any late notice. (JA 556, 836.)

Although Regatta had made numerous late payments in the parties' course of performance over the prior sixteen (16) years, HUD instructed Reilly to accelerate the mortgage on July 19, 2000, supposedly because of a late June 1, 2000, payment and a late July 1, 2000, payment, stating, "Because of HUD's interest in this matter, we request that you expedite the filing of this insurance claim." (JA 556, 557.) HUD did not notify Regatta of its instruction to Reilly to accelerate and to file a mortgage insurance claim. Regatta first received a copy of HUD's July 19, 2000 letter to Reilly more than three years later when it was an exhibit to HUD's motion in the litigation.

Reilly sent Regatta a letter on July 26, 2000, purporting to accelerate the outstanding principal balance due on the mortgage without identifying any late payments or any other specific reason or basis for

acceleration. (JA 558.) Regatta made the late June 2000 payment in the month of July, which Reilly accepted. Regatta also made the July 2000 payment on July 28, 2000, which is within the thirty (30)-day grace period provided in the Note. (JA 543, 1094.) Reilly sent Regatta's July 2000 check back. HUD and Reilly treated the July 2000 payment as never having been made. (JA 1088, 1089.)

Without notifying Regatta that HUD was treating Regatta's returned July 2000 payment as a missed payment by Regatta, Reilly assigned the Note and Trust Deed to HUD, as HUD requested. (JA 482, 557.) In both its October 13, 2001 Notice of Default and Foreclosure Sale and the December 18, 2003 Declaration of Janet L. Browder, HUD's responsible San Francisco Hub asset manager, HUD identified the July 1, 2000 payment as initiating HUD's foreclosure on the property. (JA 607, 629.) Neither HUD nor Reilly notified Regatta in July 2000 that they regarded the timing of the July 2000 payment as the basis for acceleration or foreclosure.

HUD's next step on August 29, 2000, was to declare Regatta to be in default of the Regulatory Agreement, which is defined as an event of default under the third covenant of the Trust Deed. (JA 537, 979.) In that letter, HUD acknowledged that Regatta had maintained the property, contrary to HUD's accusation in the March 24, 2000, letter. After Reilly returned Regatta's July 2000 payment and HUD declared Regatta to be default of the Regulatory Agreement by August 29, 2000, Regatta did not tender any more monthly payments towards the principal balance Reilly asserted to be accelerated. On September 8, 2000, Regatta filed for Chapter 11 bankruptcy reorganization protection but was

ultimately unable to successfully reorganize.

Regatta's General Manager, Phil Rosequist, consulted with David Ewing, HUD's agent in the Las Vegas office that HUD had identified to Regatta as having "full authority to make decisions". (JA 949.) Mr. Ewing informed Mr. Rosequist that HUD intended to enforce its demand for more than one million dollars to the extent of foreclosing on the property regardless of the lack of merit to HUD's demand. (JA 855, 856, 949.)

Neither Reilly nor HUD ever accepted Regatta's right to cure by the July 28, 2000, payment or even Regatta's thirty (30)-day grace period under the Note to make the July 2000 payment. When HUD sent a letter to Regatta on May 22, 2001, announcing HUD's intent to foreclose, HUD first described to Regatta the late July 2000 payment, which Reilly had returned to Regatta, as being a "default" upon which "HUD declares the principal balance due and payable." (JA 597.) HUD consistently denied Regatta any right to cure the late monthly payments to avoid acceleration and foreclosure. (JA 1130.)

On June 12, 2001, Regatta responded to HUD's May 22, 2001, letter by denying HUD's entitlement to foreclosure under HUD's own legal and economic policies and by requesting HUD to reconsider its vindictive approach against Regatta. (JA 962,963.) HUD nonetheless held a foreclosure sale on December 8, 2001. (JA 962, 963.)

On August 21, 2003, Regatta filed its Complaint for wrongful foreclosure under the Federal Tort Claims Act in the United States District Court, District of Nevada. At that time, HUD's position was that the substance of the claim, rather than the terminology or characterization, controlled, and that the facts show that this case is within the jurisdiction of the Court of

Federal Claims. (JA 65, 66, 74.) HUD specifically argued that the Court of Federal Claims had exclusive jurisdiction over tortious breach of contract claims. The district court ordered the case transferred to the United States Court of Federal Claims on May 6, 2004. (JA 454.)

On January 5, 2006, the Court of Federal Claims granted summary judgment, dismissing Regatta's contract-based claims. The court did not address Regatta's cross-motion for continuance to permit depositions to be taken and discovery to be had under Rule 56(f). (1a.) In its crossmotion, Regatta identified witnesses it requested to depose and documents it wished to access to adequately respond to the United States' arguments about HUD's and Reilly's knowledge of the harm likely to result to Regatta from their denial of Regatta's contractual and statutory right to cure. (JA 715.) Regatta requested to have document production and depositions about details of HUD's and Reilly's handling of the demand for more than one million dollars, HUD's request to expedite filing of the insurance claim and the mortgage assignment transactions that they did not disclose in the Motion for Summary Judgment.

The Court of Federal Claims dismissed Regatta's third claim for breach of the covenant of good faith and fair dealing along with Regatta's second, fourth and fifth claims for tortious breach of contract, over which HUD argued the court lacked jurisdiction in contradiction to its argument made to the Nevada district court one year earlier. (6a, 10a; **compare** JA 65 with JA 1132.) E.g., *Morris v. United States*, 33 Fed.Cl. 733, 742 (1995). The Court of Federal Claims granted summary judgment on all other counts based upon the statement of facts the court provided.

With its opposition brief Regatta filed a twenty-one (21)-page, detailed, response to the requested findings under RCFC 56(h)(2). (6a; JA 682-702.) Regatta cited affidavits and numerous exhibits and stated numerous factual counterpoints, most of which are stated hereinabove, to the factual assertions by the United States. The Court of Federal Claims stated that no genuine material facts are disputed, but the court did not address Regatta's twenty-one page factual counterpoints. (6a.)

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS OF APPEAL AND LOWER COURTS IN THOSE CIRCUITS ARE SPLIT ON THE JURISDICTIONAL QUESTIONS PRESENTED.

At HUD's urging, the Nevada District Court transferred the case to the Court of Federal Claims. HUD argued:

> **THE COURT OF FEDERAL CLAIMS HAS EXCLUSIVE JURISDICTION IN THE INSTANT ACTION.**
>
> * * * *
>
> The instant cause of action ostensibly involves an express contract, a regulatory agreement, and ostensibly a Deed of Trust, with the United States and Plaintiff, seeking recovery of more than $10,000. It must, therefore, be brought in the Court of Claims. DSI Corp. v. Secretary of Housing and Urban Development, 594 F.2d 177, 180 (9th Cir. 1979).

> . . . It is well settled that the Court of Claims, in deciding whether a case is "sounding in tort" will "look to the substance of plaintiff's claim rather than the terminology or characterization used."
>
> The Court of Federal Claims has consistently accepted jurisdiction over claims of "tortious breach" of contract. *Morris v. United States*, 33 Fed.Cl. 733, 742 (1995) Where a valid contract is alleged, "the fact that the alleged breach is also tortious does not foreclose Tucker Act jurisdiction." A claim "is not barred simply because it might also be stated as a tort." The Ninth Circuit Court of Appeals appears to have accepted this rationale. In *Northstar Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994), the Court held that a plaintiff's claim "concerned solely with rights created within the contractual relationship and [having] nothing to do with duties arising independently of the contract . . . is 'founded . . . upon [a] contract with the United States' and is therefore within the Tucker Act . . . [.]"

(JA 65, 66, bolding, capitalization and underscoring in original, citations omitted.) HUD correctly cited the Ninth Circuit law as interpreting the Tucker Act to vest the Court of Federal Claims with exclusive jurisdiction over contract claims against the United States exceeding $10,000.

In *Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644 (5th Cir. 1980), the Fifth Circuit Court of Appeals disagreed with the principle held by the Ninth Circuit in *DSI Corp.* The Fifth Circuit held that the

district court had jurisdiction over a contract claim against the Secretary of HUD and that the Court of Federal Claims did not have exclusive jurisdiction. The Fifth Circuit reasoned that the Secretary of HUD had a funding source separate from the national treasury, which separation of funding allowed suit in district court against the Secretary under the National Housing Act separate and apart from jurisdiction under the Tucker Act over a claim against the United States.

In *Carlyle Gardens Co. v. Delaware State Housing Authority*, 659 F. Supp. 1300 (D.Del. 1987), the court described the circuit courts as split on how to resolve the issue, citing additional cases from the Second and Seventh Circuits. Id. at 1305. The *Carlyle Gardens Co.* court determined exclusive jurisdiction over the contract claims against the United States to vest in the Court of Federal Claims pursuant to *Portsmouth Redevelopment and Housing Authority v. Pierce*, 706 F.2d 471 (4th Cir. 1983).

Portsmouth Redevelopment and Housing Authority, and *Carlyle Gardens*, both reason that appropriations from the national treasury into separate funds do not change the character of the funds as being of the national treasury. These courts held that the Court of Federal Claims has exclusive jurisdiction over contract claims against the United States.

In the instant case, the Court of Federal Claims grouped Regatta's claim for breach of the covenant of good faith and fair dealing together with Regatta's other tortious breach of contract claims, which were the second, fourth and fifth counts, which the court dismissed for lack of subject matter jurisdiction, as HUD requested. (JA 7, 474, 476, 477.) As HUD argued below, the dismissal of the tortious breach claims for lack of jurisdiction goes against the court's opinion in

Morris v. United States, 33 Fed.C. 733, 742 (1995). Because the Court of Federal Claims did not discuss the reason for its jurisdictional decision, it remains unknown whether the court followed the Fifth Circuit's reasoning about the source of funding for the contract claim at issue. The court granted summary judgment on all other contractual-based claims which were not for torious breach. (JA 7, 475.)

The Federal circuit's affirmance of the Court of Federal Claims' dismissal for lack of subject matter jurisdiction conflicts with the principles held by the Ninth Circuit in *DSI Corp., supra*, and arguably with the Fourth Circuit in *Portsmouth, supra*, as well. The split between the circuits may be broad or narrow, depending upon whether the funding source issue is deemed controlling. Neither the Ninth Circuit nor the Federal Circuit necessarily held the funding source to be controlling, but they nonetheless conflict in their views and results about the Court of Federal Claims' jurisdiction. To the extent the funding source is not an issue in this case, the Federal Circuit decision below conflicts with all of the circuit courts cited in this case, which all at least implicitly recognize that the Court of Federal Claims has at least concurrent jurisdiction, if not exclusive jurisdiction. The granting of Regatta's certiorari petition would allow the Court to resolve the conflict between the circuits.

II. ALL PARTIES WITH SIMILAR CLAIMS AGAINST ANY AGENCY OF THE UNITED STATES WOULD BENEFIT FROM A WRIT OF CERTIORARI IN THIS CASE.

The Court of Federal Claims has given its opinion in this case that it has no jurisdiction over a

claim for breach of the covenant of good faith and fair dealing. In affirming, the Federal Circuit has essentially given its opinion that the Court of Federal Claims need not hear any claims against the United States for breach of the covenant of good faith and fair dealing.

Both the Ninth Circuit and the Fourth Circuit opine that the Court of Federal Claims has exclusive jurisdiction over contract claims against the United States exceeding $10,000. If these two courts or any of the district courts within their circuits continue to recognize transfers to the Court of Federal Claims to be appropriate, parties with such claims will have to look to the Court of Federal Claims to exercise jurisdiction. Refusal by the Court of Federal Claims to hear such cases would leave these type of claimants against any federal government agency without a forum and without an opportunity to have their claims heard.

The Court of Federal Claims has recognized in the past its jurisdiction over such claims. In *Southern California Edison v. United States*, 58 Fed.Cl. 313 (2003), the court recognized an implied covenant of good faith and fair dealing in every contract. *Id.* at 325. The court also recognized the presumption of good faith unless bad faith is shown, which requires a plaintiff with such a claim to prove facts constituting malice or an intent to injure. *Id.* at 325. The court relied on its earlier case of *Asco-Falcon II Shipping Co. v. United States*, 32 Fed.Cl. 595 (1994).

In *Asco-Falcon II*, the court found that it had jurisdiction over claims for breach of the covenant of good faith and fair dealing. The court ruled that a claim for breach of the duty of good faith "requires 'well neigh irrefragable proof' to induce the court to abandon the

presumption of good faith dealing". *Id.* at 64, citing *Kalvar Corp. v. United States*, 211 Ct.Cl. 192, 543 F.2d 1298, 1301-02 (Ct.Cl. 1976). The court equated this standard to clear and strong evidence of specific acts of bad faith by the government. *Id.* In *Asco-Falcon II*, while the proof standard is difficult, it is not impossible.

If the Court of Federal Claims could refuse to hear such cases because of the difficulty of proof, it would have no way of providing redress where the proof standard is met, regardless of the difficulty. Regatta's instant case is for such a claim.

The granting of certiorari would help plaintiffs with such claims in the future know where to file their actions. Granting certiorari would also let the Court of Federal Claims and the Federal Circuit know whether such claims belong in their respective courts.

III. GRANTING CERTIORARI WOULD MAKE POSSIBLE THE CORRECTION OF THE COURT OF FEDERAL CLAIMS' ERROR IN THIS CASE AND HELP PREVENT SIMILAR ERRORS FROM OCCURRING IN THE FUTURE.

The Court of Federal Claims has held in the past that it has jurisdiction over claims for breach of the covenant of good faith and fair dealing. E.g., *Southern California Edison*, *supra*, and *Asco-Falcon II*, *supra*. The United States cited both of these cases in its motion and recognized the court's jurisdiction at oral argument. (JA 666, 1132.) The United States also acknowledged to the Nevada district court that the Court of Federal Claims has jurisdiction over contract-based tortious breach claims generally.

Any opposition by the United States now to the

principle that the Court of Federal Claims has jurisdiction would be contradictory to the United States' prior position. It would also further show the mischief which can result from this type of error by the Court of Federal Claims. If the Court of Federal Claims does not take jurisdiction, Regatta will never have an opportunity to have its claim heard for breach of the covenant of good faith and fair dealing.

The implied covenant of good faith and fair dealing is a part of every contract. A breach of the covenant supports a claim for breach of contract. Such a breach also supports the intent element for tortious breach of contract claims. A breach of the covenant of good faith and fair dealing is also relevant to Regatta's other claims for declaratory judgment and breach of statutory duties under the Multi-Family Mortgage Foreclosure Act, 12 U.S.C. § 3704, 3705, for HUD's foreclosure without meeting the contractual prerequisites of a breach necessary to comply with the Act.

Finally, HUD has asserted the position that no inverse condemnation claim can lie, but HUD argued below that it had no privity with Regatta. (JA 659, 660.) In *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed.Cir. 1998), HUD's taking of the landowner's property rights without a contractual right to do so resulted in liability by HUD for just compensation under the Fifth Amendment. HUD's counsel's denial of privity renders Regatta's alternative takings claim viable.

It was error for the Court of Federal Claims to grant summary judgment against Regatta. The court was required to review the inferences to be drawn from the underlying facts in the light most favorable to Regatta. E.g., *Celotex Corp. v. Catrett*, 477 U.S. 317,

327, 91 L.Ed. 2d 265, 106 S.Ct. 2248, 2254 (1986). The court also erred by failing to allow Regatta an adequate time for discovery. *Celotex*, *supra*, and Fed.R.Civ.P. 56(f).

The court erred by denying Regatta the opportunity to conduct discovery concerning HUD's knowledge of the harm substantially certain to result from HUD's instruction to Reilly to treat the Note as accelerated. The Trust Deed provides a contractual right to cure, and NRS 107.080 prohibits acceleration of a trust deed in Nevada without providing prior notice and a right to cure. (JA 537.) NRS 107.080(2) and (3) provide in pertinent part as follows:

> 2. The power of sale must not be exercised, however, until:
>
> (a) In the case of any trust agreement coming into force:
>
> * * *
>
> (2) On or after July 1, 1957, the grantor . . . has for a period of 35 days, computed as prescribed in subsection 3, failed to make good the deficiency in performance or payment;
>
> (b) The beneficiary, the successor in interest or the beneficiary or the Trustee first executes and causes to be recorded in the office of the recorder of the county wherein the trust property, or some part thereof, is situated a notice of the breach and of his election to sell or cause to be sold the property to satisfy the obligation [. . . .]

* * *

3. The . . . 35-day period provided in paragraph (a) of subsection 2 comm[e]nces on the first day following the date upon which the notice of default and election to s[e]ll is recorded in the office of the county reco[r]der of the county in which the property is loc[a]ted and a copy of the notice of default and elect[i]on to sell is mailed by registered or certified mail, return receipt requested and with po[s]tage prepaid to the grantor, and to the perso[n] who holds the title of record on the date the notice of default and election to sell is record[e]d, at their respective addresses, if known, othe[r]wise to the address of the trust property. The notice of default and election to sell must des[c]ribe the deficiency in performance or paymen[t] and may contain a notice of intent to decl[a]re the entire unpaid balance due if acceleratio[n] is permitted by the obligation secured by th[e] Deed of Trust, **but acceleration must not o[c]cur if the deficiency in performance of paym[e]nt is made good and any costs, fees and exp[e]nses incident to the preparation or recordat[i]on of the notice and incident to the making [g]ood of the deficiency in performance or pay[m]ent are paid within the time specified in su[b]section 2.**

(Emphasis added.) HUD's demand that Reilly accelerate in violation of the sta[t]ute shows an intent by HUD to injure Regatta.

HUD's Hub Asset Manag[e]r, Ms. Browder, relied upon HUD's July 19, 2000, [d]irective to Reilly for acceleration as being the [b]asis to initiate the acceleration and foreclosure. (JA 629.) HUD did not

itself purport to accelerate but instead "required" Reilly to accelerate. (JA 556.) HUD's only disclosure between March 24, 2000, and May 3, 2001, to Regatta of a basis for acceleration and foreclosure was HUD's demand for more than one million dollars in thirty days. HUD waited more than a year during this time period to disclose that its demand for more than one million dollars was based upon payments which HUD's own Inspector General did not regard to be improper at the time of the audit in 1993 and which payments were more than six years old when HUD made its demand in 2000.

HUD has not denied a vindictive intent but has taken the approach that its intent is irrelevant. (JA 604, 856.) HUD used contradictory jurisdictional arguments below to "ping pong" the case out of district court and out of the Court of Federal Claims.

The court erred by dismissing Regatta's contract-based claims by summary judgment. The court should also have granted Regatta the opportunity to conduct discovery about HUD's and Reilly's knowledge of why HUD had threatened corrective action if Regatta did not pay one million dollars within thirty days; why HUD then directed Reilly to accelerate Regatta's Note; why Reilly rejected Regatta's cure payment; and why HUD foreclosed on the basis of the treatment of Regatta's July 28, 2000 payment Reilly returned as having never been made.

The Court of Federal Claims erred by dismissing for lack of jurisdiction Regatta's claim against HUD for breach of the covenant of good faith and fair dealing. Had the court considered the evidence of this claim, it also should not have granted summary judgment on the contract-based claims.

CONCLUSION

Regatta requests the Court to grant Regatta's Petition for Writ of Certiorari to make possible vacating the Court of Federal Claims' Judgment and remanding to the Court of Federal Claims to hear Regatta's claims and to allow discovery and trial on the merits.

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Attorneys for Petitioner

06-5061

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REGATTA BAY LIMITED,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

December 8, 2006, Decided
December 8, 2006, Filed

NOTICE: DECISION WITHOUT PUBLISHED OPINION

JUDGES: RADER, and DYK, Circuit Judges, WHYTE, District Judge *.

* Honorable Ronald M. Whyte, District Judge, United States District Court for the Northern District of California, sitting by designation.

OPINION: JUDGMENT

This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

Per Curiam

AFFIRMED. See Fed. Cir. R. 36.

Filed: January 5, 2006

No. 04-1403C

In the United States Court of Federal Claims

REGATTA BAY LIMITED,
Plaintiff-,

v.

UNITED STATES,
Defendant.

Paul C. Ray, John Peter Lee, LTD., Las Vegas, Nevada, for plaintiff.

David B. Stinson, United States Department of Justice, Commercial Litigation Branch, Civil Division, Washington D.C., for defendant.

OPINION

HODGES, Judge.

HUD encourages private industry to provide low-income housing by insuring mortgages for the construction and renovation of existing housing projects that satisfy the requirements of the National Housing Act, 12 U.S.C. §§ 1701-1715. Regatta Bay owned a 120-unit housing project in Nevada, constructed with the proceeds of a loan insured by Department of Housing and Urban Development pursuant to the Act. 12 U.S.C. § 1709. The United

States eventually foreclosed on the housing project for default of its note and mortgage. Plaintiff filed suit in a Nevada district court as a result of the foreclosure, and the case was transferred here.

Regatta Bay seeks $2,000,000 in damages for breach of contract and a declaratory judgment that plaintiff did not breach a Regulatory Agreement connected with the transaction. Plaintiff evidently believes that if HUD foreclosed on Regatta Bay's property pursuant to the Regulatory Agreement, such foreclosure was improper. The Regulatory Agreement governed the conditions upon which plaintiff operated the housing project, however. HUD foreclosed on the project pursuant to the terms of its note and mortgage. See 12 U.S.C. §§ 3705-3708.

Plaintiff's Complaint includes allegations of wrongful foreclosure, tortious interference with contractual relations, tortious breach of fiduciary duty, and breach of covenants of good faith and fair dealing. The Government moved to dismiss Regatta Bay's causes of action for lack of jurisdiction and for summary judgment. Defendant acted properly within the rights assigned to the Government in the deed of trust and note.

BACKGROUND

HUD insures mortgages for the construction or rehabilitation of existing multifamily housing projects that meet the eligibility requirements of the National Housing Act. 12 U.S.C. §§ 1701-1715. Owners agree to operate the housing projects in compliance with terms

and conditions of Regulatory Agreements, and HUD protects lenders from default.

Plaintiff's September 1979 Regulatory Agreement with HUD was typical in that it contained conditions governing operation of the housing project. See 12 U.S.C. § 1709; 24 C.F.R. § 200.105. For example, it placed restrictions on plaintiff's management of funds and required Regatta Bay to maintain the property in accordance with government standards for public housing. Regatta Bay acquired the property involved in this lawsuit in November 1983. The property was subject not only to the Regulatory Agreement but also to a $3,685,100 note and mortgage.

Regatta Bay often was late on its payments to the holder of the HUD-insured note and mortgage, Reilly Mortgage Group, Inc. When Regatta Bay did not make its June 2000 payment on time, HUD instructed Reilly Mortgage to accelerate plaintiff's debt. Reilly accelerated plaintiff's note on July 19, 2000. Plaintiff alleged in its Complaint that neither Reilly Mortgage nor HUD had objected to Regatta Bay's many late payments before this.

Regatta Bay sent the June payment to Reilly on July 28, along with another check in the same amount. Plaintiff has stipulated that it submitted the July 28 payment for the installment due on June 1, 2000. Reilly returned the extra payment, and plaintiff did not make payments to Reilly Mortgage Group thereafter.

HUD had sent Regatta Bay notices of violations of its Regulatory Agreement in March and April of 2000 because it asserted that plaintiff was mismanaging

funds and not maintaining the property as required. HUD informed Regatta Bay in August 2000 that it remained in default of the Regulatory Agreement for failure to take corrective action regarding the mismanagement of funds and the physical upkeep of the property that HUD had warned Regatta Bay about in March and April of 2000.

Regatta Bay filed for Chapter 11 bankruptcy protection in September 2000. Reilly assigned its note and mortgage to HUD once the Government paid its loan guaranty, and HUD recorded the assignment on October 6, 2000. HUD acquired Reilly's position as first lienholder of the property, along with the rights to any rents generated. HUD filed a proof of claim for $3,062,808 in the bankruptcy court on February 21, 2001. Regatta Bay stipulated on April 4, 2001 that the United States had a valid, secured claim against all of the plaintiff's property, that the property had a market value of $2,360,000, and that Regatta Bay had no equity in its property.

The bankruptcy court issued an order on April 25, 2001 granting the Government's motion for relief from the automatic stay. HUD sent Regatta Bay a notice of intent to foreclose in May 2001 and served plaintiff with a notice of default and foreclosure sale in October 2001.

HUD and Regatta Bay agreed in November 2001 that HUD would cancel its foreclosure sale if plaintiff made its $3,062,808 payment no later than December 3, 2001. Plaintiff did not take this opportunity to cure, and the foreclosure sale proceeded the next day. HUD received $3,600,000 for the property and paid the surplus to Regatta Bay.

DISCUSSION

This court has jurisdiction to hear "any claim against the United States founded either upon the Constitution . . . or any regulation . . . or upon any express or implied contract with the United States . . . not sounding in tort." 28 U.S.C. § 1491(a)(1). Plaintiff's claims in this case include wrongful foreclosure, tortious interference with contractual relations, tortious breach of fiduciary duty, and breach of covenants of good faith and fair dealing. The parties agree that no genuine, material facts are disputed. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-52 (1986); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); RCFC 56(c).

Plaintiff seeks damages arising from an alleged unlawful acceleration of the loan and the subsequent foreclosure on Regatta Bay Apartments by HUD. Regatta Bay argues that HUD foreclosed because of plaintiff's default of the Regulatory Agreement. Comp. ¶ 22. Defendant asserts that the foreclosure was based upon Regatta Bay's default on the note.

A. Acceleration and Foreclosure

The terms of plaintiff's note and mortgage controlled its debt. HUD's authority to instruct Reilly to accelerate plaintiff's debt due to default, and to foreclose on the property, arose from the note and mortgage, not the Regulatory Agreement. The note states:

If default be made in the payment of any installment under this Note, and if such default is not made good prior to the due date of the next such installment, the

entire principal sum and accrued interest shall at once become due and payable without notice; at the option of the holder of this Note.

HUD directed Reilly to accelerate the note because plaintiff did not make its June 2000 payment on time. Regatta Bay argues that its June 2000 payment should not have been treated differently from the other late payments. Its Complaint states,

whenever Regatta was late with any payment Regatta paid a contractually pre-determined late fee which the loan servicing agent, Reilly Mortgage Group, Inc. and HUD accepted as not being a material breach [and] HUD never objected to the lateness of any of Regatta's payments despite being made after the deadline of the first of the month on numerous occasions throughout the time of [plaintiff's] ownership.

Compl. ¶ 5. The note provides that the Government cannot waive its right to accelerate, however: "Failure to exercise this option [acceleration] shall not constitute a waiver of the right to exercise the same in the event of any subsequent default." Moreover, the June 2000 payment was different from Regatta's previous late payments.

Regatta Bay admitted that "[a]ll the payments that were made that were late that were accepted by Reilly were within the grace period." The note could be accelerated at any time that an installment was not made prior to the due date of the next installment. Regatta Bay's June 2000 payment was due on June 1; the July payment was due on July 1. Plaintiff made its

June payment on July 28. This was outside the grace period.

B. Regulatory Agreement

Plaintiff seems to assert that HUD and Reilly derived their rights to accelerate and foreclose the loan from the Regulatory Agreement. The Regulatory Agreement governed the management operations of the housing project. See 12 U.S.C. § 1709; 24 C.F.R. § 200.105. Plaintiff's improper use of funds and failure to maintain the property were violations of the Regulatory Agreement. HUD's letter to Regatta on August 29, 2000 included the following:

[T]he Secretary has . . . declared [Regatta Bay] to be in default of [the] Regulatory Agreement. Such default is based on violations of paragraphs 8(b) and (e) of the Regulatory Agreement. As an immediate effect of the default, the Department intends to take other enforcement actions which may include, but not limited to, the imposition of other administrative and/or civil sanctions as determined appropriate by the Department.

HUD made no mention of acceleration or foreclosure in this letter. The Government warned only that Regatta Bay could be fined, or that other sanctions could apply. HUD addressed acceleration and foreclosure in its May 29, 2001 letter:

HUD has determined that the mortgage on Regatta Bay Apartments is in default because payments for the months of July 1, 2000 through May 1, 2001 have not been made. Sufficient payments are not being made to

cure the financial default. HUD's policy is that it will initiate foreclosure proceedings on mortgages in default

. . . .

The note and mortgage had no application to the civil penalties invoked by violation of the Regulatory Agreement. Default of the Regulatory Agreement led to potential fines, whereas default under the note led to acceleration and foreclosure. No connection of record exists between default of the Regulatory Agreement and foreclosure on the property, other than their proximity in time.

C. Opportunity to Cure

Reilly assigned its rights to the Government once it had accelerated the note and been paid on its guaranty. Regatta Bay could have cured its default prior to foreclosure pursuant to the Multi-Family Mortgage Foreclosure Act. 12 U.S.C. §§ 3705-3709. Foreclosure may be cancelled if the debtor tenders "the entire amount of principal and interest which would be due if payments under the mortgage had not been accelerated," before the public auction is completed. 12 U.S.C. § 3709(a)(3). HUD offered to cancel the foreclosure provided the $3,062,808 were paid by December 3, 2001. HUD proceeded with foreclosure when plaintiff rejected this offer. HUD's notice of intent to foreclose dated May 22, 2001 asked plaintiff to show "reasons why foreclosure should not take place." Regatta Bay did not provide such reasons, but stated in a June 12, 2001 letter that:

HUD should not foreclose on the subject property because of a number of miscommunications which have

occurred in the instant case involving the inherently difficult task of communication and coordination of multiple offices located in San Francisco, Los Angeles, and Washington, D.C.

These were not sufficient legal reasons why HUD should not have proceeded with foreclosure; plaintiff did not dispute its financial default.

D. Declaratory Relief

Regatta seeks a declaratory judgment that the Government was incorrect in its finding that plaintiff was in default of the Regulatory Agreement. Compl. ¶¶ 54-58. Regatta Bay argues that "HUD's denial of Regatta's rights to insurance under the Regulatory Agreement and . . .HUD's pursuit of the wrongful declaration of default and foreclosure of the property constitutes a taking in violation of the Fifth Amendment of the United States Constitution." Compl. ¶ 65. Plaintiff's rights arose from its contracts with the Government; however, so only contractual remedies apply. Sunrise Village Mobile Home Park, L.C. v. United States, 42 Fed. Cl. 392, 404 (1988). Reilly Mortgage accelerated the loan and assigned it to HUD. HUD did not take plaintiff's property for public use, but to satisfy Regatta Bay's note and mortgage.

CONCLUSION

The Government's foreclosure on the subject property was appropriate given the terms of HUD's note and mortgage. Defendant's motion to dismiss counts 2, 3, 4, and 5 is GRANTED; its motion for summary judgment on all other counts is GRANTED. The Clerk of the

Court will enter judgment for the Government and dismiss plaintiff's Complaint. No costs.

s/Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

06-5061

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REGATTA BAY LIMITED,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

February 14, 2007, Decided

February 14, 2007, Filed

NOTICE: THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

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For United States, Defendant-Appellee: CHANDLER, ROBERT E., PRINCIPAL ATTORNEY, MELNICK, MARK A., STINSON, DAVID B., COHEN, DAVID M., OF COUNSEL ATTORNEYS, Department of Justice, Washington, DC; ODABASHIAN, LUC-

ANDRE, OF COUNSEL ATTORNEY, Department of Housing and Urban Development, Los Angeles, CA.

OPINION: ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on February 21, 2007.

Filed 1/6/2006

No. 04-1403C

In the United States Court of Federal Claims

REGATTA BAY LIMITED,
Plaintiff-,

v.

UNITED STATES,
Defendant.

JUDGMENT

Pursuant to the court's Opinion, filed January 5, 2006, granting defendant's motion to dismiss counts 2,3,4, and 5, and granting defendant's motion for summary judgment on all other counts.

IT IS ORDERED AND ADJUDGED this date, purusant to Rule 58, that judgment is in favor of defendant and the complaint is dismissed. No costs.

28 U.S.C. § 1491(a):

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been

issued under section 6 of that Act.

Supreme Court, U.S.
FILED
JUL 13 2007
OFFICE OF THE CLERK

No. 06-1371

In the Supreme Court of the United States

PETRIT NDRECA, AKA XHAFER GORJA, AND ENGLANTINA NDREU, AKA ELMOZA GORJA, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed the petition for review of an order of the Board of Immigration Appeals because the petition was not timely filed.

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In the Supreme Court of the United States

No. 06-1371

PETRIT NDRECA, AKA XHAFER GORJA, AND ENGLANTINA NDREU, AKA ELMOZA GORJA, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 18a-19a) and of the immigration judge (Pet. App. 20a-56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 2006. A motion for reconsideration was denied on November 7, 2006 (Pet. App. 17a). The petition for a writ of certiorari was filed on February 5, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are citizens of Albania. In October 2001, the Department of Homeland Security initiated removal proceedings against petitioners, alleging that they were subject to removal under 8 U.S.C. 1182(a)(6)(C)(i), for having sought to procure a visa or admission to the United States by fraud or misrepresentation, and 8 U.S.C. 1182(a)(7)(A)(i), for being immigrants who, at the time of application for admission, were not in possession of a valid visa or other entry document required by statute. Pet. App. 19a-22a.

2. At a hearing before an immigration judge, petitioners conceded their removability but sought asylum, withholding of removal, and relief under the Convention Against Torture. Pet. App. 21a-22a. The immigration judge determined that petitioners' testimony "was not sufficiently detailed, consistent or believable to provide a plausible account of the basis for their fears and, thus, cannot suffice to establish their eligibility for asylum" or other relief. *Id.* at 54a.

Petitioners appealed to the Board of Immigration Appeals (BIA). The BIA concluded that the immigration judge's findings were "supported by the record," and it dismissed the appeal. Pet. App. 19a. The BIA issued its decision on July 12, 2006.*

3. Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, a petition for judicial review "must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). Federal Rule of Appellate Procedure 25(a)(2)(A) provides that "filing is

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* As reproduced in the appendix to the petition for a writ of certiorari, the BIA's order bears the date "July 12, 2003," Pet. App. 18a, but the actual date is July 12, 2006. *Id.* at 4a.

not timely unless the clerk receives the papers within the time fixed for filing."

In petitioners' case, the 30-day period for receipt of a petition for review expired on August 11, 2006. That day, petitioners sent a petition for review to the Eleventh Circuit clerk's office by Federal Express. Pet. 5; Pet. App. 16a. The petition for review was received and date-stamped filed on Monday, August 14. Thereafter, the court of appeals dismissed the petition for lack of jurisdiction, finding it untimely under Section 1252(b)(1). *Id.* at 1a.

ARGUMENT

Petitioners argue (Pet. 19-25) that the court of appeals should have exercised jurisdiction over their untimely petition for review of the BIA's order. That claim lacks merit. The court of appeals properly dismissed the petition for lack of jurisdiction because it was not timely filed. The decision below does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. To invoke the jurisdiction of a court of appeals, an alien must file a petition for review "not later than 30 days" after the final order of the Board of Immigration Appeals. 8 U.S.C. 1252(b)(1). This Court has held that court of appeals "lack[s] jurisdiction to review" a BIA order if the petition for review is not filed within the statutory time limit. *Stone* v. *INS*, 514 U.S. 386, 406 (1995); see *Bowles* v. *Russell*, 127 S. Ct. 2360, 2364 (2007) (reaffirming the "longstanding treatment of statutory time limits for taking an appeal as jurisdictional"). Petitioners do not dispute that their petition for review was not filed within the time specified by Sec-

tion 1252(b)(1). Accordingly, the court of appeals correctly determined that it lacked jurisdiction.

2. Petitioners suggest (Pet. 23-24) that the decision below creates a circuit conflict with the Ninth Circuit, because the latter court "would have equitably tolled the Petitioners' deadline." Petitioners rely (Pet. 24) on the Ninth Circuit's decision in *Iturribarria* v. *INS*, 321 F.3d 889, 897-898 (2003), but that case involved equitable tolling of the time limit for filing a motion to reopen in *administrative* proceedings, not the statutory 30-day period for filing a petition for review in a court of appeals, which this Court held in *Stone* imposes a *jurisdictional* requirement. Under *Bowles*, such a jurisdictional limitation is not subject to equitable tolling. See *Bowles*, 127 S. Ct. at 2366 ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements."). In any event, counsel's mistaken failure to meet a filing deadline is not a basis for tolling. See *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1085 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling.").

3. Petitioners had the assistance of counsel in their administrative removal proceedings, and they do not contend that counsel's representation in those proceedings was inadequate. Petitioners do contend (Pet. 19-25) that their attorney's failure to file a timely petition for review constituted ineffective assistance of counsel and violated the Due Process Clause. That argument lacks merit. This Court has held that the ineffectiveness of a litigant's attorney cannot be the basis of a constitutional claim unless the litigant has a constitutional right to appointed counsel. See *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991); *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982) (per curiam). Petitioners cite no author-

ity for the proposition that there is a constitutional right to appointed counsel in judicial review of immigration proceedings.

Instead, petitioners rely (Pet. 20-21) on *Dearinger ex rel. Volkova* v. *Reno*, 232 F.3d 1042 (9th Cir. 2000), which, in their view, conflicts with the decision below. In *Dearinger*, an alien's attorney filed a petition for review of a BIA decision one day after the deadline for filing had expired, and the petition for review was dismissed as untimely. *Id.* at 1044. The alien's next friends subsequently filed a petition for a writ of habeas corpus in district court, and that court directed the government to re-enter the order of removal to afford the alien another opportunity to file a timely petition for review. *Ibid.* The Ninth Circuit affirmed the district court's exercise of habeas jurisdiction and its grant of relief, holding that counsel's error constituted ineffective assistance of counsel and denied the alien due process. See *id.* at 1045-1046.

Contrary to petitioners' suggestion, *Dearinger* does not conflict with the decision below because it did not hold that a court of appeals may exercise jurisdiction over an untimely petition for review if the untimeliness was due to an attorney's error. Instead, *Dearinger* held that an alien could seek habeas relief from a district court. Petitioners have not done so here. In any event, *Dearinger* has been superseded by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which provides that the district courts lack habeas jurisdiction to review any question of fact or law regarding any proceeding brought to remove an alien. See *id.* § 106(a)(1) and (2), 119 Stat. 310-311.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2007